DIGEST OF CASES

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ALPHABETICAL INDEX

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ABBREVIATIONS EXPLAINED.

J.	Ajmer-Merwara-Law Journal.
S.	Supplement to the Ajmer-Merwara Law-Journal
1. J. 16.	Vol. 1.—Ajmer-Merwara Law Journal Page 16.
1924 S. 1.	1924 —Supplement to the Ajmer-Merwara Law-Journal at Page 1.

DIGEST.

[1] *Acknowledgment.*

(1) Acknowledgment saves limitation but plaintiff must prove his cause of action. *1 J. 16*

(2) An acknowledgment can form basis of a suit. *1926 S. 4*
1926 S. 29

(3) The words 'without prejudice' have no meaning, an offer qualified with these words amounts to an acknowledgment and saves limitation. *1927 S. 15*

[2] *Adoption.*

A sonless Jain widow can adopt without husband's permission or kinsmen's consent. A Jain can be adopted till 32 and probably there is no limit of age.

No adoption ceremonies are necessary amongst Jains but there is no decided case in Ajmer-Merwara.

Doctrine of factum-valet applies to lack of non-essential ceremonies only. Even amongst Jains, orphans cannot be adopted without a custom as giving ceremony is essential and universal in Hindu Law. *1927 S. 42*

[3] *Adverse Possession*

Exclusive possession of one co-sharer is not *per se*, adverse, there should be open assertion of hostile title

An alienee's possession becomes adverse forthwith provided other co-sharers have notice.
1927 S 37

[4] *Amendment.*

See. C. P. C., O. 6. R. 17.

[5] *Ajmer Courts' Regulation.*

(1) Sec. 15.—No second appeal lies under S. 15 against a decision which is final under the Civil Procedure Code. *1 J. 25*

(2) Second appeal lies on both facts and law. *2 J. 27*

(3) The new Regulation of IX of 1926 has not taken away rights of appeal under old Regulation which accrued before it became law. *2 J. 27*

(4) S. 17.—No second appeal lies when first appellate Court confirms original Court's decision.
1 J. 29

[6] *Ajmer Land Revenue Regulation.*

(1) Sec. 7.—Every occupier of unimproved Shamlat land is a tenant at will. *2 J. 23*

(2) **Ss. 9, 10 & 119.**-Civil Courts can partition lands not covered by section 9. *2 J. 45*

(3) S. **41.**— Usufructuary mortgage creates ex-proprietory tenancy. *1925 S. 49*

(4) S. **107.**—This section does not provide for trial and disposal of rent suits by Revenue Officers. There are no rent Courts in Ajmer-Merwara.
2 J. 23

(5) Dewan of Dargah is a Jagirdar and not an Istimrardar. *1925 S. 26*

[7] *Arbitration-Award.*

1. Award would be maintained if bad portion is separable

(12) **S. 151.** *a*—Even if no sufficient cause shown court has inherent power to restore suit dismissed for default.

1927 S. 20

b-Court cannot alter its order because subsequently it changes its mind

1926 S. 19

c—Abuse of court's powers defined.

1925 S. 49

d—High Court can remand a case in the interests of justice.

1925 S. 42

e—Has no application where other provision of law exists. *3 J. 13*

1926 S. 19

(13) **O.1 R.8**-If order made in trial court it is not necessary to adopt similar proceedings in appellate court. *2 J 55*

(14) **O. 2 R. 2**— Plaintiff though entitled to claim possession can sue for damages only and decree for mesne profits cannot be refused if they are due.

2 J. 23

(15) **O. 6 R. 17.** *a*—Suit as brought unsustainable, plaint cannot be ordered to be amended. Proper order is to allow its withdrawal with leave to bring a fresh suit.

1926 S. 41

b—Leave to amend—when granted and when refused.

1925 S. 21

c—Order refusing amendment is not revisable.

1925 S. 21

d—When finding about unmaintainability of suit not set aside, no leave to amend can be granted.

2 J. 75

(16) **O. 9 R. 8**—Ex-parte orders should be passed only on *proof of legal service.*

1 J. 14

(17) **O. 9 R. 9.** *a*—Plaintiff reaching court the same day, suit should be restored

3 J 4

b—Even if no sufficient cause shown, court has inherent power to restore suit dismissed for default.

1927 S. 20

(18) **O. 14.**—Double and negative issues create confusion and should not be framed.

3 J. 13

(19) **O. 17 R. 3.**—Case not dismissed on merits, order is not under O. 17 R. 3. *1926 S. 41*

(20) **O. 21 R. 89.**—Sale on Sunday is not invalid. *2 J. 83*

(21) **O 22 R. 3 (2) & R. 4.** *a*—No decree which would be infructous can be passed in absence of legal representatives of the parties.

b—In a *representative suit* if legal representatives are not brought on record the whole suit abates.

2 J. 55

(22) **O. 22 R. 5.**—Intermeddler and reversioner are both legal representatives. *2 J. 17*

(23) **O. 22 R. 9.**—No second appeal lies against an order under this rule. *3 J. 19*

(24) **O. 23 R. 3.**-An adjustment or compromise in appeal can be enquired into by appellate court alone and not by the trial court. *1926 S. 19*

(25) **O.27 R.4.**-The enquiry should be carried out by the court in which the suit is filed. *1 J. 9*

(26) **O.37 R. 7.**-Query — Does an agreement to refer fall within this rule. *1927 S. 26*

(27) **O. 39 R. I.**—Order not granting injunction is not revisable. *1925 S. 9*

(28) **O. 41 R. 23.** *a*—Case not dismissed on merits—it is a decision on a preliminary point. Preliminary point meaning of. *1926 S. 41*

b—Any question of fact or law the decision of which avoids full hearing is a preliminary point. *2 J. 62*

(29) **O.47 R. I.** *a*—It is no ground for review that if another opportunity is granted applicant would satisfy that previous order was wrong. *1926 S. 28*

b—Discovery of new authority is no ground. *1926 S 19*

c—What is 'sufficient cause' *1925 S. 2*

d—The words "other sufficient cause" should be construed on the principle of 'ejusdem generis.' *1924 S. 1*

e—[1] No review lies against order dismissing suit or application for default.

[2] An order allowing such review is revisable. *1924 S. 1.*

f—Omission to hear parties in revision is no ground for review *1 J. 6*

(30) **Schedule 2 Para 20 (2)**—Persons not parties to reference cannot be made parties in the application to file the award *1 J. 7*

[9] *Contract Act.*

a—In absence of prohibition a wife is entitled to pledge her husband's credit for necessaries. *1 J. 16*

b-Station Masters and Traffic Inspectors have no authority to bind the Railway Administration by their promises. *1925 S. 14*

c—**S. 184**-A minor can be an agent but principal cannot sue minor for loss nor can minor sue principal for his commission. *1926 S. 9*

[10] *Co-Sharers.*

Exclusive possession of one is not *perse* adverse possession. There should be an open assertion of hostile title. An alienee's possession however becomes forthwith adverse provided other co-sharers have notice of the alienation *1927 S. 37*

[11] *Court fees Act.*

a—**S. 7 Cl. 4 (c)**-Plaintiff is not entitled to assume a ridiculous figure for consequential relief. *1925 S. 1*

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[11] *Court fees Act.*

a—**S. 7 Cl. 4** (c)-Plaintiff is not entitled to assume a *ridiculous* figure for consequential relief. *1925*

b—**Article 17 (VI)**-Partition suits when plaintiff is in possession of some portion of joint property fall within the provisions of the article. *2 J. 1 All. H.C.*

[12] *Costs.*

a—Suit not tried on merits, ordinary rule is to direct each party to bear his own costs. *1926 S. 88*

b—Second appeal lies with regards to costs when question of principle is involved. *1926 S. 88*

[13] *Criminal Procedure Code.*

(1) **S. 28**-Commitment for an offence under S. 147 I. P.C. is not illegal if Magistrate thinks that he can not punish adequately *1927 S. 4*

(2) **S.195**-'Court of Justice' includes a Revenue Court. Taking of evidence on oath or not is immaterial. *1925 S. 26*

(3) **S. 202**-Statements under this section cannot form basis of conviction. *1 J. 37*

(4) **S.208**-Omission to record evidence offered by the accused is an illegality. *1925 S. 33*

(5) **S 238**-It is open to court to convict for a minor offence though accused is challaned for a major offence. *2 J. 51*

(6) **S. 342.**

a—Applies to even summons cases tried summararily *1 J. 39, 2 J. 39.*

b—Non-observance vitiates trial. *2 J. 22*

(7) **S. 367**-Judgment based on a previous judgment which has been set aside is defective. *3 J. 8*

(8) **S. 369**-There is no review in Criminal Procedure case. *3 J. 16* *1927 S. 6*

(9) ***Ss. 421 & 422***- *Cr.* P. Code does not provide for disposal of appeals on preliminary points. If they are not disposed of summararily notice must issue to other side. *1927 S. 6*

(10) **S. 423**-Substitution of *fine in lieu of imprisonment* is not enhancement of sentence. *1 J 23, 1927 S. 12*

(11) ***S. 439*** (5)-No revision lies when appeal provided *1 J. 5*

(12) **S. 503.**— There is no irregularity in examining a witness at his house. *2 J. 54*

(13) **S. 526.** a—A remark by Magistrate causing alarm in accused's mind is sufficient to justify transfer. *1 J. 28*

b—The trying court is bound to allow reasonable time for obtaining orders from High Court. *1 J. 37*

c—Refusal by trying Magistrate to decide question of title does not justify a transfer. *2 J. 9*

(14) S. 562-No sentence can be passed when benefit given under this section.

1 J. 41

(15) **Miscellaneous.**

a—If conviction is reversed and case is remanded the accused should be tried by another Magistrate.

3 J. 18

b—Criminal proceedings cannot be stayed till decision of civil suit between the parties. *1925 S. 29*

c—To disbelieve defence on strength of evidence not recorded in the case amounts to illegality. *1925 S. 30*

d—Case reported in 29 All. 434 has not been followed elsewhere. Confession or statement of co-accused alone is not sufficient for conviction without corroboration. *1925 S. 35*

e—Provisions of joint trials are not applicable to commitment proceedings.

1927 S. 4

[14] *Custom.*

Market custom is binding on all dealers in that market.

2 J. 25

[15] *Damages.*

There are 3 classes of damages (1) to a man's fame (2) to person and (3) to property. Where no physical damage has been done no question of mental damage arises. *1926 S. 17*

[16] *Easements Act.*

a—Where the appertures which have been closed are the only means or egress of foul air, injunction is the proper remedy and not damages. *2 J. 73*

b—An easement decree should specify amount of air and light the succeeding party is entitled to. *2 J. 73*

[17] *Evidence Act.*

a—Witness can be contradicted only if former discrepant statement is put to him. *1925 S. 31*

b—Where execution of Khata Baqi is admitted burden of non-receipt of consideration is on defendant.

1926 S. 4

c—Previous conviction can be taken into consideration when awarding sentence but not in determining guilt.

1927 S. 1

d—Burden of Proof.

(1) A thief is not to prove that he did not steal.

3 J. 7

(2) No court can place it where it does not lie

3 J. 23

e—S 74—Certified copies of entries of public record are admissible without proof.

2 J. 55

f—S. 115 (1)-Representation under mistake of fact is not estoppel. It should be intentional. *1925 S. 1'*

(2) First suit dismissed on admission of personal liability for claim by a witness. He cannot deny his liability in subsequent suit on that admission

1 J. 13

g—S. 116—Tenant retaining possession cannot deny landlord's title. He should file another suit after giving possession. Question of title between landlord and tenant can not be gone into a rent suit.

3 J. 11

[18] *Excise Regulation.*

(1) When illicit opium is secretly placed by its owner in an unlikely place it continues to be in the owner's possession, secrecy taking place of locks and bolts,

1927 S. 9

(2) If a substance has a chemical trace of cocaine only it is not a sale of cocaine.

1925 S. 30

[19] *Fraud.*

Parties equally guilty of fraud-defdt. should succeed if fraud has been carried out. *2 J. 37*

[20] *Guardian and Wards Act.*

S. 25 (1)—Father can entrust custody and education of his children to another but the authority is revocable Courts in India exercise equity jurisdiction and they can refuse return of custody of children to their father if the welfare of the minors demands it. What is minor's Welfare, defined

1926 S. 49

[21] *Hindu Law.*

a—Sons and grandsons are bound to pay off mortgage executed for liquidating antecedent debts. *2 J. 69*

b—Antecedent debt means antecedent in fact as well as in time. Borrowing on the occasion of a grant of mortgage is not antecedent.

1925 S. 45

[22] *Indian Factories Act.*

S. 41—A breach of rules under S. 18 cl (4) falls under this section. A manager can escape liability only when the offence is proved against the actual offender. *2 J. 39*

[23] *Interest.*

a—When there is a pledge as security, rate of 40 per cent is excessive and unfair.

3 J. 5

b—Stipulated rate should be allowed however high unless it comes under S. 74 of the Contract Act or S. 3 of the Usurious Loans Act.

3 J. 5, 1927 S. 19

[24] *Jains.*

a—Jains in matters of adoption and inheritance are governed by Hindu Law in absence of custom.

b—A sonless Jain widow can adopt without husband's permission or kinsmen's consent

c—A Jain can be adopted till 32 and probably there is no limit of age.

d—No adoption ceremonies are necessary amongst Jains but there is no decided case in Ajmer-Merwara.

c—Even amongst Jains orphans cannot be adopted without a custom.

1927 S. 12

[25] *Jurisdiction.*

a—A Court cannot acquire jurisdiction by mere practice.

2 J. 23

b—Jurisdiction depends on frame of suit and not on the defence set up.

1926 S. 17

c—Objection against jurisdiction can be taken at any time It cannot be given up by waiver.

1927 S. 1

[26] *Land acquisition Act.*

The ordinary principle of awarding compensation defined.

1925 S. 54

[27] *Limitation Act.*

(1) **S 5 & Article 164.**—Section 5 has no application in Ajmer-Merwara for setting aside ex-parte decree.

1927 S 23

(2) **Ss. 6 and 8.**— Section 8 governs section 6.

1927 S. 37

(3) **S 13.**—Where defendant is resident of a Native state very little evidence is sufficient to obtain benefit of this section because the presumption is that he normally resides out of British India.

1927 S. 50

(4) **S. 20** — Payment by money order saves limitation. Date of receipt and not despatch is date of payment.

1927 S. 25

(5) **Article 120.**—Limitation for suit to enforce pious obligation of a Hindu son is 6 years. It runs from the death of the father.

1925 S 45

(6) **Articles 142 & 144.**—A suit by a co sharer or co-mortgagor who did not join alienation for possession is governed by Article 144 and not 142.

1927 S. 37

(7) **Article 144.**—If property lost by auction sale comes again in hands of legal representatives-in-interest, it does not give first starting point for limitation.

2 J. 77

(8) Decree payable by instalments and whole amount payable on default. On defautl Decree-Holder must execute for the whole amount due. He has no option to go on receiving instalments. Limitation for the whole amount runs from date of default. *1925 S. 57*

[28] *Mohamedan Law.*

Pirzadas are not recognised as a class. *1927 S. 15*

[29] *Mortgage.*

(1) Purchase of part of the mortgaged property by mortgagee does not discharge the mortgage. *1 J. 18*

(2) An usufructuary mortgage amounts to a parting with proprietory rights, which are made up of rights of possession, enjoyment and disposition.

1925 S.

[30] *Penal Code.*

(1) **S. 84.**—The criterion is whether accused knew the nature of the act. Abnormality alone is not sufficient.

2 J. 14

(2) **Ss. 186 & 353.**-Greater offence includes the lesser. A man cannot be convicted both of assault on and obstructing a public servant. A mere flight is no obstruction.

1927 S. 1

(3) **S. 302.**—It is unsafe to convict on the sole uncorroborated evidence of an eye-witness. *2 J. 3*

(4) **S. 376.**— Of all false charges rape is the one most easily made. In rape cases very great weight is attached to the character of the prosecutrix.

1925 S. 39

(5) **S. 447** — Intention to annoy should be inferred from actions. A man is presumed to intend natural consequences of his actions

2 J. 21

(6) **S. 464** — The word 'make' does not necessarily connote execution or signature of a document. Essence of offence of forgery defined. Invoices do not require signature or execution.

1926 S. 1

(7) **Sentence.**—Should not be severe where intention is to give ordinary beating though they result in grievous hurt

2 J. 47

| *Possession*

orporeal contact is not phy- lement involved in legal n of possession.

Possession means not only power to deal with a thing to the exclusion of others but also determination to exercise it on one's behalf.

1927 S. 9

[32] *Practice.*

(1) In Ajmer-Merwara the Allahabad view is to be preferred when there is conflict of opinion amongst the various High Courts.

1926 S. 25

(2) Mention of wrong provision of law does not make order under that provision.

1926 S. 41

(3) Sign of truth is agreement of witnesses on material facts with discrepancies on minor points. Agreement on minor points is generally a sign of concocted evidence.

1927 S. 47

(4) Fixing case on holiday and absenting a party on the following day is improper.

1 J. 9

(5) Court is bound to compel attendance of defence witnesses. *1 J. 27*

(6) The doctor who first examined and treated the injured person must be called by the Prosecution, failing which, by the Court. *2 J. 47*

(7) An order should state the authority on which it is made.

3 J. 13

(8) Witnesses present should be examined to save their repeated attendance.

3 J. 21

(9) High Court will not ordinarily substitute its own appreciation of evidence or facts for that of the trial Court.

1925 S. 9

(10) Necessary facts not pleaded or proved. Court not entitled to apply law relevant to those facts.

1925 S. 45

(11) There is no presumption that sales by widows are at a ruinous rate for them.

1925 S. 54

[33] *Pre-emption.*

(1) **S. 7.**—Land within Municipal limits of a town is not governed by 'S. 7. Revenue records are not evidence of real character of an area.

3 J. 1

(2) **S. 8.**—There is no presumption in Ajmer town about the prevalence of the right of pre-emption. It must be positively proved by the plaintiff.

3 J. 23

(3) Not necessary to find market price when actual price has been ascertained.

3 J. 10

[34] *Provincial Insolvency Act*

(1) **S. 28 (2) & S. 66 (2)**—Receiver has no more power to leave more than a moiety of a public-servant-insolvent's pay in his hands, though under S. 66 (2) he may allow some portion of the moiety of the attached pay to him for maintenance.

1926 S. 31

(2) **75**—A revision lies to the High Court. Code of Civil Procedure applies to Insolvency Courts only in so far as its provisions have been incorporated in Act V of 1920. *1926 S. 31*

[35] *Provincial Small Causes Courts Act.*

(1) **S. 17.**—A deposit or security within period of limitation for application is enough.

1 J. 15

(2) **S. 25.** *a*— High Court will interfere if the decision is inequitable. To reject undefended claim supported by sworn testimony is inequitable. *2 J. 31*

b—Wrong decision on limitation is not ground *per se* for revision.

1925 S. 6

c—Revision lies against an order by the S.C.C. under S. 95 C. P. C.

1925 S. 17

d—No revision on findings of fact unless impossible or perverse. That H. C may take different view of evidence is no ground for revision. *1925 S. 18*

(3) **Article 31.**—Is not applicable, if there is no allegation about defendant's receiving the suit money. *1 J. 25*

(4) Suit for recovering money awarded by Arbitrator is cognisable by Small Causes

1926 S. 14

(5) Suit for damages for refusing to allow irrigation f a well is Small Causes.

19

[36] *Public. Gambling Act.*

(1) **S. 6**—A find of instruments of gaming in a house raises a presumption under this section against the owner of the house. *2 J. 10*

(2) **S. 6.**—It is not essential that every transaction connected with gaming should occur in the gaming house. *2 J. 10*

(3) Tickets used as a memoranda to recover wagers are instruments of gaming. *2 J. 10*

[37] *Railways Act.*

(1) **S. 54.**—Rule 59 of the Classification of goods, rule is not ultra vires. *1 J. 1*

(2) **S. 72.** *a*—Railway must prove loss to claim protection of Risk-Note. Mere non-receipt at destination is not loss. *3 J. 3*

b—Overcharge of freight at destination by mistake does not affect the contract under the Risk-Note *1925 S. 14*

(3) **Ss 77 & 140.** *a*—A notice should be served on the Agent and on no other officer. *1 J. 1*

b—The provision of notice is imperative. *1 J. 10*

[38] *Registration Act.*

Obiter:—A mere receipt of mortgage-money does not require registration. *1927 S. 42*

[39] *Revision.*

See S 115 C. P. C. & S. 25 Provincial Small Causes Courts Act.

[40] *Succession Act.*

S. 302. *a*—Court is entitled to pass orders for immediate necessities of the deceased's family.

b—Court is bound to grant administration on the pleadings.

c—A sole administrator is preferable to joint administrators, male to female and one accustomed to business to one who is not. *1927 S. 32*

[41] *Tort.*

Private nuisance like privy-test of inconvenience. *1927 S. 29*

[42] *Transfer of Property Act.*
See Mortgage.

[43] *Usurious Loans Act.*
See also Interest.

The Act applies to Ajmer-Merwara. *3 J. 5*

[44] *Will.*

A person appointed by a will to represent the estate in litigation is an Executor. A man ceases to be an executor when the contingency for which he was appointed takes place. *2 J. 43*

Errata to the Supplement A. M. L. J.

(Please Correct wherever necessary.)

1924

At Page	1.	Line 15.	For Apperance	Read Appearance.

1925.

" "	3.	Last line	For Judgement	Read Judgment.
" "	5.	Line 5.	" "	" "
" "	8.	" 10.	" Applicttion	" Application.
" "	8.	" 13.	" Revison	" Revision.
" "	8.	" 21	" Argueable	" Arguable.
" "	9.	" 12.	" Judgement	" Judgment.
" "	"	" 23.	" Appllcants	" Applicants.
" "	11.	" 8.	" A. D. J.	" A. D. J'S.
" "	11.	" 10.	" Arbitrarly	" Arbitrarily.
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" "	14.	" 3.	" Filling	" Filing.
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" "	18.	" 30.	" Cival	" Civil
" "	19.	" 13.	" On	" No.
" "	20	" 5.	" Beginning	" Begining.
" "	"	" 29.	" Neocessarily	" Necessarily.
" "	21.	" 22.	" 1927	" 1925.
" "	23.	" 2.	" Mortgagor	" Mortgagee.
" "	23.	" 29.	" Questen	" Question.
" "	25.	" 28.	" Intriduce	" Introduce.
" "	34.	" 21.	" Illegallity	" Illegality.
" "	35.	" 18.	" Deceaseds	" Deceased's.
" "	36.	" 5.	" Presecution	" Prosecution.
" "	38.	" 23.	" Shees	" Shoes.
" "	39.	" 26.	" Primo facie	" Prima facie.
" "	41.	" 9.	" Findings	" Finding.
" "	42.	" 8.	" Assesors	Assessors.
" "	47.	" 4.	" Defendent	" Defendant.
" "	"	" 26.	" Sons	" Sons'
" "	51.	" 11.	" With in	" Within.
" "	56.	" 1.	" Gangmens	" Gangmen's.
" "	57.	"	" Apperlant	" Appellant.

1926.

At Page 1.	Line 8.	Insert "in" between "produces" and "its."		
,, 1	,, 9.	For	Indeture	Read Indenture.
,, 1.	,, 22.	,,	Imprisionment	,, Imprisonment.
,, 3.	,, 8.	Insert "in" between "produces" and "it."		
,, 4.	,, 21.	For	Indiad	Read Indian.
,, 5.	,, 31.	,,	Filled	,, Filed.
,, 7.	,, 9.	,,	Evidentary	,, Evidentiary.
,, 11.	,, 6.	,,	Appellant	,, Applicant.
,, 14.	,, 5.	,,	Allahabod	,, Allahabad
,, 25.	,, 2.	,,	Arise	,, Aside.
,, 28.	,, 15.	,,	Appliction	,, Application.
,, 29.	,, 5.	,,	Applient	,, Applicant.
,, 29.	,, ,,	,,	Was	,, Has.
,, 30.	,, 24.	,,	Clain	,, Claim.
,, 30.	Last line	,,	Thiorough	,, Through.
,, 33.	Line 11.	,,	Sin	,, Suo.
,, 36.	,, 15.	,,	Shorn	,, Short.
,, 36.	,, 15.	,,	Technicalties	,, Technicalities.
,, 40.	,, 10.	,,	Judgement	,, Judgment.
,, 40	,, 18	,,	,,	,, ,,
,, 42	,, 9.	,,	Respondant	,, Respondent.
,, 43	,, 13.	,,	Which	,, With.
,, 44	,, 2.	,,	Then	,, There.
,, 44	,, 16.	,,	Order	,, Other.
,, 47	,, 6.	Insert '4' between 'but' and 'could.'		
,, 48	,, 27.	For	Respondants	Read Respondents.
,, 49	,, 22.	,,	Welfore	,, Welfare.
,, ,,	,, 24.	,,	Capricous	,, Capricious.
,, ,,	,, 31.	,,	Appelant	,, Appellant.
,, 52.	,, 31.	,,	Tho	,, The.
,, 54.	,, 2.	,,	Capricous	,, Capricious.
,, 54.	,, 8.	,,	Interferred	,, Interfered.
,, 55.	,, 29.	,,	Univerity	,, University.
,, 56.	,, 4.	,,	Gnardianship	,, Guardianship.
,, 56.	,, 24	,,	Clerly	,, Clearly.
,, 56.	,, 24.	,,	Shonld	,, Should.

1927.

At Page 3.	Line 11.	For offence	Read Offence.
,, ,, 4.	,, 20.	,, Seperate	,, Separate.
,, ,, 5.	,, 12.	,, ,,	,, ,,
,, ,, 5.	,, 28 & 29.	,, Comitmment	,, Comitment.
,, ,, 7.	,, 6.	,, Appeallant	,, Appellant.
,, ,, 15.	,, 15.	,, Re-ognised	,, Recognised.
,, ,, 20.	,, 18.	,, Causes	,, Cause.
,, ,, 20.	Last line but one Insert 'an' between 'is' and 'application.'		
At Page 22.	Line 11.	For Judgement-debtor	Read Read Judgment-debtor.
At Page 24.	Line 21.	For Courts'	Read Court's.
,, ,, 29.	,, 11.	,, Ofs	,, Of
,, ,, ,,	,, 12.	,, Tm	,, The.
,, ,, 36.	,, 25.	,, Maynot	,, May not.
,, ,, 38.	,, 4.	,, Per seo	,, Perse.
,, ,, 40.	,, 7.	,, Assestion	,, Assertion.
At Page 40.	Line 3.	Put a full stop after necessary, and put in Capital 'N' for small 'n.'	
At Page 43.	Line 16.	For Jaorr	Read Jarao.
,, ,, 44.	,, 20.	,, Brought	,, Bought.
,, ,, 46.	,, 4.	,, ,,	,, ,,
,, ,, 46.	,, 10.	,, Statament	,, Statement.
,, ,, 47.	,, 1.	,, Is	,, In.
,, ,, 48.	,, 3.	,, Circum Stances,	Circumstances.
,, ,, 48.	,, 11.	,, Victom	,, Victim.
,, ,, 48.	,, 24.	,, Worbing	,, Working.
,, ,, 48.	,, 29.	,, Secused	,, Accused.
,, ,, 48.	Last line	,, Case	,, Cart.
,, ,, 49.	Line 29.	,, Witneas	,, Witness.
,, ,, 49.	,, 26.	,, Be	,, Bo.
,, ,, 49.	,, 28.	,, Dne	,, Due.
,, ,, 49.	,, 31.	,, Cace	,, Case.
,, ,, 49.	Last line	,, Conduct	,, Conduct.
,, ,, 51.	Line 25.	,, Rebate	,, Rebate.

—o—

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REVISION APPLICATION NO. 132 OF 1924.

BEFORE MR. S. J. MURPHY, I.C.S.

Ganesh Das *son of* Kalu Ram *of* Beawar:

Defendant—*Applicant.*

Versus

Inder Bhan Bhargava son of late Pandit Phul Chand under the guardianship of his mother Mst. Parbati and others of Ajmer.

Opposite Party.

Application against the order of the Sub-Judge, Ajmer, passed on 5th November 1924.

(a) The words 'other sufficient cause' in O. 47, R. 1 are to be construed in the light of the previous words and on the principle of the rule of 'ejusdem generis.' A.I.R. 1922, P.C. 112 (Chajju Ram v. Neki) foll.

(b) Default in putting in an apperance under O. 9, R. 8. is in no sense analogous to these sufficient causes and no review against an order dismissing suit or application in default lies. A I.R. 1924, Cal. 774 relied upon.

(c A revision lies against such a wrong order allowing review.

M. L. Capoor and B. D Khanna ... . *for Applicant.*
Daya Shanker ... ... *for Respondent.*

ORDER.

Applicant seeks to have the order of the Sub-Judge, First Class granting a review of his order dismissing the plaintiffs' suit for default of appearance, revised. The points arising are (1) whether the order complained of is open to revision and (2) whether if it is the learned Sub-Judge had power to grant a review.

I find on these points—(1) In the affirmative, and (2) in the negative. Revision is sought under Section 115 (c) of the Codeof Civil Procedure. The issue really depends on the second issue. The question is whether the facts as found constitute within the meaning of Order 47 rule 1 'other sufficient cause.' The Privy Council's decision in Chajju Ram *v.* Neki (1922 P.C.) is that these words are to be construed in the light of the previous words and on the principle of the rule of 'ejusdem generis.' The reason must be one having sufficiency of a kind analogous to excusable failure to bring to the notice of the Court new or important matter, or analogous to error on the face of the record. It seems to me that default in putting in an appearance under Order 9 rule 8 is in no sense analogous to these sufficient causes and moreover another remedy is provided which in this case was resorted to and which resulted in a second failure. I think no review was maintainable. The facts are practically parallel to the ones considered in the Calcutta case, Bindubeshini Roy v. The Secretary of State reported in the All India Reporter Nov. 1924 part 11 p. 774 and it is an adjacent case. I set aside the order of the court below and direct the original decision to be restored. Costs of this application and the review will be paid by the opposite party.

14-3-25

1925.

(1) REVIEW APPLICATION NO. 18 OF 1925.

Connected with Civil Application No. 88 of 1924, & Civil Second Appeal No. 14 of 1926.

BEFORE MR. S. J. MURPHY, I. C. S.

Firm Soorat Ram Poonam Chand through Soorat Ram of Beawar. ... ... *Applicant.*

Versus.

Firm Jhunta Lal Kalyan Mal of Naya Nagar.—*Opp. Party.*

Against C. C.'s Order—*dated 14-11-1924.*

(a) Though the High Court's Jurisdiction under S. 115 C.P.C. is not subject to any specific limitation yet the High Court will refuse to entertain such applications where there has been unreasonable and unaccounted for delay.

(b) An order rejecting an application for revision on the ground that it is belated is an exercise of judicial discretion, which is not ordinarily revised but when the delay was due to the applicants' having moved the lower Appellate Court for amendment of the decree and this fact was overlooked by the Revising Court it would amount to 'sufficient cause' within the meaning of O. 47; R. 1 C.P.C.

(c) An Appellate Court while dismissing an appeal and confirming the Lower Court's decree cannot direct the Lower Court to make a fresh decree on a new basis of calculation. Its so acting would amount to a material illegality and irregular exercise of jurisdiction.

G. P. Mathur, Bar.-at-Law ... *for Appellant.*
26-10-25. L. N. Varma ... *for Opposite Party.*

JUDGMENT.

There is a long and unfortunate history of previous proceedings in this matter. The plaintiffs claim was originally decreed for Rs. 1673-1-0. An appeal against this decree was heard by the learned Additional District Judge who held that the suit had rightly been decreed and dismissed the appeal but unfortunately issued a direction to the original court to amend its decree as to the basis of taking accounts. The original court did so with the result that the claim was decreed for Rs. 3446-2-9 against defendants who had appealed against the decree for Rs. 1673-1-0 and plaintiffs were ordered to pay additional court fee in proportion. Defendants again appealed to the District court and the learned Additional District Judge who again heard the appeal dismissed it on the ground that he had already heard it (and dealt with it in his judgement of the 13th November 1920) and could not re-

I find on these points—(1) In the affirmative, and (2) in the negative. Revision is sought under Section 115 (c) of the Codeof Civil Procedure. The issue really depends on the second issue. The question is whether the facts as found constitute within the meaning of Order 47 rule 1 'other sufficient cause.' The Privy Council's decision in Chajju Ram v. Neki (1922 P.C.) is that these words are to be construed in the light of the previous words and on the principle of the rule of 'ejusdem generis.' The reason must be one having sufficiency of a kind analogous to excusable failure to bring to the notice of the Court new or important matter, or analogous to error on the face of the record. It seems to me that default in putting in an appearance under Order 9 rule 8 is in no sense analogous to these sufficient causes and moreover another remedy is provided which in this case was resorted to and which resulted in a second failure. I think no review was maintainable. The facts are practically parallel to the ones considered in the Calcutta case, Bindubeshini Roy v. The Secretary of State reported in the All India Reporter Nov. 1924 part 11 p. 774 and it is an adjacent case. I set aside the order of the court below and direct the original decision to be restored. Costs of this application and the review will be paid by the opposite party.

14-3-25

1925.

(1) REVIEW APPLICATION NO. 18 OF 1925.

Connected with Civil Application No. 88 of 1924, & Civil Second Appeal No. 14 of 1926.

BEFORE MR. S. J. MURPHY, I. C. S.

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Versus.

Firm Jhunta Lal Kalyan Mal of Naya Nagar.—*Opp. Party.*

Against C. C.'s Order—*dated 14-11-1924.*

(a) Though the High Court's Jurisdiction under S. 115 C.P.C. is not subject to any specific limitation yet the High Court will refuse to entertain such applications where there has been unreasonable and unaccounted for delay.

(b) An order rejecting an application for revision on the ground that it is belated is an exercise of judicial discretion, which is not ordinarily revised but when the delay was due to the applicants' having moved the lower Appellate Court for amendment of the decree and this fact was overlooked by the Revising Court it would amount to 'sufficient cause' within the meaning of O. 47; R. 1 C.P.C.

(c) An Appellate Court while dismissing an appeal and confirming the Lower Court's decree cannot direct the Lower Court to make a fresh decree on a new basis of calculation. Its so acting would amount to a material illegality and irregular exercise of jurisdiction.

	G. P. Mathur, Bar.-at-Law	... *for Appellant.*
26-10-25.	L. N. Varma	... *for Opposite Party.*

JUDGMENT.

There is a long and unfortunate history of previous proceedings in this matter. The plaintiffs claim was originally decreed for Rs. 1673-1-0. An appeal against this decree was heard by the learned Additional District Judge who held that the suit had rightly been decreed and dismissed the appeal but unfortunately issued a direction to the original court to amend its decree as to the basis of taking accounts. The original court did so with the result that the claim was decreed for Rs. 3446-2-9 against defendants who had appealed against the decree for Rs. 1673-1-0 and plaintiffs were ordered to pay additional court fee in proportion. Defendants again appealed to the District court and the learned Additional District Judge who again heard the appeal dismissed it on the ground that he had already heard it (and dealt with it in his judgement of the 13th November 1920) and could not re-

hear it, except as a review although it was in fact a fresh decree. This order was made on 15-4-1923.

An application to revise it was first dismissed and then allowed on a review by the learned Chief Commissioner and the appeal was remanded to the District Court so that justice might be done to the parties. It was accordingly re-heard by the learned Additional District Judge who however again passed an anomalous order, by which he amended his judgment and decree of 13-11-20 though what the effect of his amendment is, is not stated in the order. The final result, however, is a decree for Rs. 775. This judgment is dated 17th December 1923. In so stating the history I have omitted to mention various other proceedings which were fruitless and which are not now necessary to the decision of this matter. A revision application was filed against this order of the 15th December 1923 and was dismissed summarily and what I now have before me is an application to review that order of dismissal. The ground of review urged is that since no statutory period of limitation is prescribed for a revision application, my learned predecessor's rejection of this application on this ground was wrong. This High court's jurisdiction under section 115 is, it is true, not subject to specific limitation, and is discretionary but all the Indian High courts refuse to entertain such applications where there has been unreasonable and unaccounted for delay. The application in this case was made on the 16th August 1924, but was in some ways defective and was not finally received till the 10th October 1924. It contained a note to the effect that it had been presented later because the applicant had meanwhile applied for the amendment of the decree of the lower Appellate court. This does not seems to have been considered, probably because it was over-looked and the order sought to be reviewed was passed without a hearing of the applicant. An order rejecting an application for revision on the ground that it is belated is an exercise of judicial discretion which is not ordinarily reviewed but I think that in the peculiar circumstances of this case the

facts stated amount to 'sufficient cause' and that I should allow the review. The next point is whether the order sought to be revised can be revised under section 115 C. P. C. If it can, this must be under clause (c) of the section, for an illegal or irregular exercise of jurisdiction. The judgement in question is that of the 17th December 1923 which professes to amend the decree of the 13th November 1920. The appeal at that date was before the learned Additional District Judge as the result of this court's order in revision of 1-9-23 which was to the effect that the appeal was remanded (implying that the decree of the 17th December 1923 was set aside) to be re-heard. The learned Additional District Judge's powers were therefore those defined in section 107 of the C. P. C. subject to the various rules in Order 41 relating to appeals. But to amend a decree formerly passed in appeal by the same court in the same matter is not one of the powers conferred on appellate courts by section 107 and Order 41 and this can only be done under section 152 or possibly in an extreme case under section 151 of the Code. The former section is confined to clerical or arithmetical mistakes or accidental slips or omissions *and does not authorize amendments on the merits, and it* does not seem to me to have been a case proper to bring within section 151 though this section is referred to in the learned Chief Commissioner's order. The real point before the learned Additional District Judge was that his decree of the 13th November 1920 was one which he was not empowered to make, for he had then been sitting as an appellate court and his powers were limited by section 107 and Order 41 and he could not while dismissing the appeal and confirming the lower court's decree direct it to make a fresh one on a new basis of calculation. He had then acted with material illegality and irregularity in the exercise of his jurisdiction and he again so acted when he amended his former appellate decree. I think that what he should have done on the remand after it had been found by himself and in revision by the Chief Commissioner that he had no authority to make the

decree he did in 1920 was to re-hear the appeal from that point neglecting all the Sub-Judge's proceedings which had resulted on his irregular direction to the original Court.

There have thus been in the course of these proceedings two instances of the illegal and irregular exercise of jurisdiction and I therefore think inspite of the delays which have taken place it is a fit case for the exercise of this court's revisional jurisdiction.

I set aside the Additional District Judge's judgment and decrees of the 13th November 1920, the 15th April 1923 and 15th December 1923 and direct that court to hear and dispose of appeal No. 88 of 1919 according to law. Applicants to get the costs of this application. The other side to pay its own and applicants.

---

(2) REVIEW APPLICATION NO. 29 OF 1925.

BEFORE MR. S. J. MURPHY I.C.S.

Sanwal Ram son of Ladhu Ram of Nasirabad. *Applicant.*

Versus.

Nauhey Khan son of Mohammed Husain, Luggage Clerk, Phulera Ry. Station. *Opposite Party.*

Against J. C's. Order—*dated 18-10-1921.*

(a) No application for Revision made more than after 6 months from the date of order complained of, will be considered, unless good grounds for the lack of reasonable diligence in the matter are shown by the applicant.

(b) A wrong decision on a question of limitation is not *per se.* ground for interfering in revision either under S. 115 of the C.P.C. or S. 25 of the Small Cause Courts Act, especially when substantial justice between the parties has been done by the Lower Court.

Diya Shanker ... ... *for the Applicant.*
26-10-25. Radhey Lal ... ... *for the Opposite Party.*

tion was available to the applicant at all. The order which aggrieved him was that the execution application No. 264 of 1923 was made 17 years after the decree which had been passed on the 15th February 1906 and was prima facie time barred and that his plea that limation was saved by reason of a compromise of the 20th March 1920 was invalid, as that compromise had itself been come to in the course of time barred execution proceedings.

This was a point of law and involved no question of jurisdiction or of its illegal or irregular exercise or a refusal to exercise it. The applicttion was not I think covered by section 115 of the C. P. C. The rule under section 25 of the Small Cause court's Act is really similar. A wrong decision on a question of limitation is not *per se* ground for interfering in revison especially when substantial justice between the parties has been done by the lower court. Now the decree in the suit was passed on the 15th February 1906 and was for Rs. 46 and interest at Rs. 3.2.% per mensem. So far Rs. 147-4-0 or more than thrice the original amount has been recovered. Ordinarily no fresh application for execution could have been entertained after February 1918 so that the 5th application made in 1919 was prima facie time barred and it is arguable whether all the subsequent proceedings are or are not so, saving, if any, being due to certain compromises, or to fraud being shown to have been practised by the judgment-debtor that is the saving would only be for some technical reasons. I am not therefore prepared to hold that the learned Judge was so wrong, if he was wrong at all, as to call for interference in revision in the matter of such an ancient decree and when substantial justice has been done.

I refuse to grant a review and dismiss this application.

(3) CIVIL APPLICATION NO. 36 OF 1925

BEFORE MR. S. J. MURPHY, I. C. S.

Shamlat Committee of Pushkar ... ... *Applicant.*

Versus.

1. Pershotam son of Ganesh Ram.
2. Rashak Lal son of Ganesh Ram.
3. Seth Ram Nath son of Ram Kishen of Kampti.
4. Jagannath and
5. Har Narain Brahman of Pushkar Gumashta (of Seth Ram Nath) residing at present at Pushkar.

Opposite Party.

Against Judgement of A. D. J.—*dated 10-2-1924.*

(*a*) When a Court refuses to make an order under O. 39, Rule 1 C.P.C. it is not a refusal of jurisdiction but an exercise of it and is not revisable.

(*b*) The H. C. will not ordinarily substitute its own appreciation of evidence or facts, or its own judgment thereon, in any matter committed by the Legislature for the final determination of an inferior court.

R. S. Mithan Lal *for Applicants.*

G. S. Varma Bar-at law for Ram Nath and Chand Karan Sarda *for the Others.*

ORDER.

The applicants have filed a suit in the Sub Judge's court in respect of certain buildings which the opponents are in course of erecting it is said as a dharamshala on a plot on the bank of the Pushkar lake. Applicants' contention is that opponents have no title to the site. An application was at the same time made for an injunction to restrain the opponents from proceeding with this erection. Both the courts below have refused to grant

temporary injunction pending decree on the ground that applicants have failed to furnish the necessary prima facie evidence in support of their right. Meanwhile I understand the buildings are approaching completion. No appeal lies from an Appellate order under order 39 rule 1. There are cases in which the Calcutta High Court has recently revised such orders without deciding whether an application to revise them was entertainable or not but the Calcutta High court is a chartered High court and has powers not possessed by this court under section 15 of the Charter Act (41 Calcutta 436 and 10 C. W. N. 442 quoted in Mullah page 797.) The application is brought on the ground that the courts below have acted in the exercise of their jurisdiction illegally and with material irregularity in not exercising their power to grant an injunction. But their power is to grant or refuse to exercise a discretion on the facts before them, and it is not a refusal of jurisdiction but an exercise of it where for reasons stated a court refuses to make an order under Order 39 rule 1. The mere fact that the order actually made is arguable or even wrong is not sufficient to bring a case within revision for the High court will not ordinarily substitute its own appreciation of evidence or facts or its own judgment thereon in any matter committed by the legislature for the final determination of an inferior court.

In the present case the building is nearing completion. It is clear that to stop its continuance may cause the builders great inconvenience and perhaps much expense, for an incomplete building necessarily deteriorates very quickly. As against this lies the probability that applicants may succeed in their suit, in which case further difficulties may arise, the building being probably by then complete. What the lower courts have actually done, is to balance one probability or inconvenience against the other on the facts now before them and do not therefore appear to me to have acted illegally or with any irregularity. I decline to reverse the order impugned and dismiss this application with costs.

(4) CIVIL REVISION APPLICATION NO. 65 OF 1925.

BEFORE MR. S. J. MURPHY, I. C. S.

Ladu Ram, Phul Kanwar and Sheo Nath Kanwar.—*Applicants.*

Versus.

Rai Bahadur Seth Champa Lal Mahajan of Beawar.

Opposite Party.

Against A. D. J. Order—*dated 18-4-1928.*

(a) Under S. 7 Clause 4 (*c*) of the Court—Fee Act the plaintiff is not entitled arbitrarly to assume a ridiculous figure for the consequential relief.

(*b*) A wrong decision in a final decree, that is a decree not subject to appeal, on a point of law involving no question of jurisdiction is not subject to revision.

	Jasoda Nandan	...	. *for Applicants.*
26-10-25.	Lakshmi Narain	.	.. *for Opposite Party.*

JUDGMENT.

This matter arises as follows:—

Civil suit No. 36 of 1919 was instituted for a declaration that the Small Cause Court Bombay's decree No. 788/15364 of 1918 is null and void and for an injunction restraining defendant from executing it. The claim was valued at Rs 180 and court fee was paid on that amount. In the first instance the court rejected the plaint as not being properly stamped. On an appeal against this order the learned Additional District Judge held that the plaintiff had wrongly valued his claim under Article 17 clause (iii) of the Court Fees Act whereas he should have done so under section 7 clause 4 sub clause (c) and also that he had not complied with section 8 of the Suits Valuation Act. He accord-

ingly held that the case was a fit one for remand and remanded it, directing the lower court to readmit it and to direct the plaintiff to re-value his plaint under section 7 clause iv (*c*) of the Court Fees Act read with section 8 of the Suits Valuation Act. The suit was accordingly revalued and tried. It failed on the merits and also on the points of court fees, the learned Sub Judge holding that since the decree to be set aside was one for Rs 1835 the proper value of the suit was the relief which could be obtained on its being decreed and that plaintiff was not at liberty arbitrarily to fix a value which was ridiculously low on what he sought to obtain. The Sub Judge directed that the deficit court fee should be made good.

On this there was an appeal to the District court. The learned Additional District Judge dealt first with the question of court fees and in an order dated 18-4-25 directed appellants to make good the deficiency in both courts as he held that the suit should have been valued at Rs 1900 instead of Rs 180 which was the plaintiff's valuation.

I think there is no doubt that for the purposes of valuation for court fees the suit fell under section 7 clause 4 (c) of the Act and the question really at issue is whether when he makes his valuation, a plaintiff is entitled to do so arbitrarily in disregard of the actual value of the relief claimed or is bound to make a reasonable and proper valuation of it. In this case in other words, have the plaintiffs valued the claim reasonably at Rs 180 in all when if successful they will thereby escape a liability for Rs 1800 or so in all.

This is a point on which there has been a conflict of decisions. The Calcutta High Court has consistently held that in such a case though it lies on plaintiff to make his valuation it must be a reasonable one and he is not entitled arbitrarily to assume a ridiculous figure for the consequential relief. The Bombay High Court has on the whole been inclined to take the opposite view. The latest case on the point appears to be the

one reported at 86 Indian Cases page 83 in which it was held that where plaintiff has valued his relief unreasonably the court can fix a valuation for him and that its order in so doing is not open to revision.

I think it is clear from these considerations that the order of the lower court which is attacked is really one on a point of law. There is no doubt that it had jurisdiction to decide the court fee payable and it has done so and the question whether it has done so rightly or wrongly is one of law. The conflict of decision between the High courts shows that it has not decided arbitrarily but reasonably and following a course of decisions in Calcutta and Allahabad.

But it is now well and finally settled that a wrong decision in a final decree, that is a decree not subject to appeal, on a point of law involving no question of jurisdiction is not subject to revision unless possibly the decision is so perverse and inequitable as to call for special interference on this ground. I think this is not one of those cases and I see no reason to revise it. I dismiss this application with cost.

---

(5) CIVIL REVISION NO. 68 OF 1925.

BEFORE MR. S. J. MURPHY, I.C.S.

1. Sohan Lal son of Misri Lal. 2. Gopi Kishen son of Ram Chandra Brahman Members of Shamlat Committee Pushkar.

Applicants.

Versus.

1. Sada Sukh Vice President Shamlat Committee.
2. Mahabir son of Aunji Ram Patel.
3. Suraj Mal son of Ram Pertap.
4. Balu Ram son of Chhoga Lal Patel.
5. Bijey Raj son of Parbhu Patel.
6. Ganga Dhar son of Ladhu Ram Patel.—*Opposite Party.*

Against order—*dated 28-3-1925. of A. C. Ajmer.*

(*a*) An order by the Advocate General refusing to give his consent to the filling of a suit under S. 92 C.P.C. is not revisable as it is not a case decided by any court within the meaning of S. 115 C.P.C.

Messrs Chand Karan Sarda & Radha Mohan Tosnival.

for the Applicants

ORDER.

There is no appeal against an order by the Advocate general refusing to give his consent to the filling of a suit under section 92 and I think it is clear that no revision application lies for, it is not a case which has been decided by any court within section 115 of the Code. Even were it one, it would be one in which the Advocaté General had exercised a discretion vested in him by law and could not be open to revision.

I dismiss this application. 27-7-25.

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(6) CIVIL REVISION APPLICATION NO. 90 OF 1925.

BEFORE MR. S. J. MURPHY, I.C.S.,

B. B. & C. I. Railway Company through its Agent at Bombay. Defendant ... ... *Applicant.*

Versus.

Firm Jamna Lal Ram Nivas of Sri-Madhopur.

Plaintiff.—*Opposite Party.*

Against R. M.'s order—*13-2-1925.*

(*a*) An over charge of freight at Railway Risk rates at destination by mistake does not affect the contract embodied in Risk Note Form B.

(b) A representation made under a mistake of fact does not amount to an estoppel. It should be intentional.

(c) Station Masters and Traffic Inspectors have no authority to bind the Railway Administration to pay any compensation to consignees.

K. S. Mathur .. ... *for Railway.*

10-11-25. Daya Shanker . ... *for Opposite Party.*

ORDER.

This is an application to revise the decree of the Small Cause Court Railways Ajmer.

The claim was for Rs. 325 for damages caused to a consignment of 'Gur' booked from Sonepat on the E. I. Railway to Sri-Madhopur on the B. B. & C. I. Railway.

The plaintiffs theory was that the bags were left on a platform exposed to rain and so were damaged. The Railway pleaded that the consignment was received in a wet condition and that the risk note held was in Form B. and that they consequently could not be charged with any liability. Some confusion has been introduced in the case by the fact that when the consignment was received at Srimadhopur the Station Master could not read on the receipt the figure showing the risk note under which the consignment had been sent and, I suppose, to protect himself charged Rs. 10-4-0 in addition, that is, at the highest possible rate. This is an over-charge for which plaintiffs can claim a refund, but I do not think it can affect the contract between the parties which was embodied in a risk note in Form B which is on the record and has been proved. By this risk note the consignors in consideration of a lower charge agreed to hold the railways concerned harmless and free from all responsibility for any loss, destruction or deterioration or damage to the said consignment from any cause whatever except for the loss of a complete consignment due to certain contingencies. The learned Judge below has not come to a definite finding on this issue probably because he framed it

wrongly "whether the Railway freight in this case was charged at owner's risk rates or at Railway risk rates ?".

I think the issue should have been :—

1. Were the goods consigned under a risk note in Form B, and the finding would then necessarily have been in the affirmative for the risk note in question has been proved. I find accordingly on this issue.

The only other point in the case is what the learned Judge has called an estoppel. It appears that the damage was assessed by the Traffic Inspector at Rs. 325 and the plantiff took delivery after paying the freight Rs. 114/-. It is clear from the plaintiff's evidence as well as *the endorsement* made on the delivery book and the evidence of Mr. Kelly the Traffic Inspector that there was an agreement as to the extent of the damage, and that every one was under the impression that plaintiff would be paid Rs. 325, though Mr. Kelly has said he made the valuation "without prejudice" and took plantiffs signature to that effect in the usual form. Mr. Kelly has admitted that in his opinion plaintiff will not have taken delivery had he not been assured that he would be paid the amount. The explanation of all this, as well as the overcharge, appears to be that the note on the railway receipt as to the form of the risk note under which it had been issued, was illegible and all concerned were probably under the impression that the railway administration was liable for deterioration. An estoppel is defined in section 115 of the Evidence Act and 117 deals with certain estoppels which can be drawn against carriers though it has no application here. Section 115 runs :—

> "Where a person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing".

Assuming that Mr. Kelly or the Station Master could make a re-presentation which would estop the railway company, it here could only be that the goods had been consigned at Railway risk or that the damage was Rs. 325 which is not now relevant and it would have to be made intentionally while it is clear that if any such representation as to the risk note were made it was under a mistake of fact. I think there is no question of estoppel in the case and that the learned Sub-Judges real reason for making his decree was that, he thought the promises, he believed, had been made by the Station Master and Traffic Inspector were binding on the railway administration. But they could only be its agents and it has not been shown that either or any of them had authority to bind the railway administration to pay compensation amounting to Rs. 325 by any such promises as I believe in fact they had not. *I think the plaintiffs' suit must fail. I set aside the lower* courts decree and dismiss plaintiffs suit but in the circumstances I direct that each party do bear its own costs throughout.

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(7) CIVIL APPLICATION NO. 169 OF 1925

BEFORE MR. W. T. W. BAKER, I.C.S.

Firm N. C. Kankaria and Co, through Kalu Ram proprietor and partner Plaintiff ... ... *Applicants.*

Versus.

Mohamed Hussain son of Fakir Mohamed Musalman Tailor, of Ajmer ... ... Defendant—*Opposite Party.*

Against J. S. C. C.—*dated 29-9-1925.*

(*a*) A revision would lie against an order of the Small Cause Court under S. 95 C.P.C. as S. 104 clause (*g*) has no application to orders of that Court. 50 I.C. 886 foll.

(*b*) When property is actully attached and entrusted to the persons who gives security for the defendant, the attachment is effected within the meaning of S. 95 C.P.C., A.I.R. 1925, Bom. 356 distinguished.

(*c*) Under the new Civil Procedure Code it is not necessary that the order awarding damages under S. 95 should form part of the decree. 17 M.L.J. 310 is obsolete.

(*d*) Damages are divided in three classes:—

(*a*) Damages to a man's fame.

(*b*) Damage done to the person.

(*c*) Damage to a man's property.

When no physical damage has been done no question of 'mental and physical damage' arises. But when an attachment is effected on insufficient grounds compensation is awardable and it matters very little by what name the damages are described.

(*e*) An order for attachment made on insufficient grounds must necessarily cause damage to the credit and reputation of the opposite party. 32 Mad. 170 foll. and 12 I.C. 507 foll.

(*f*) Even in Revision under S. 25 of the Provincial Small Causes Courts Act, it is not the practice to interfere with findings of fact unless there is no evidence to support the finding or unless the finding is impossible and perverse. 1925 All., 172 Foll.

Even the fact that the Revisional Court may have taken a different ivew of the evidence is not a justifiable ground for interference. 48 I.C 907 Foll.

	B. D. Khanna	... *for the Applicant.*
22-7-1926.	Parmatma Swarup	... *for the Opposite Party.*

ORDER.

This is an application for revision of an order passed by the Judge of the Small Cause court Ajmer under section 95 of the Civil Procedure Code awarding the opposite party Rs. 150 *viz* 100/-damages and 50/-costs as compensation for the attachment of his goods by the applicant.

A preliminary objection is taken by the opposite party that no revision will lie, as the order under section 95 is appealable

under section 104 *clause* (g) of the Code. This would be so if the order in question had been passed by a court in the exercise of ordinary civil jurisdiction but the order is by a Small Cause Court against whose decision, no appeal lies.

This has been held by the Madras High court in Arumuyam Asari Versus Gurumuth Asari 50 I. C. page 886 which is precisely the same as the present case, the order being under section 95 C. P. C. by a Small Cause Court.

That case expressly overrules the case on which the opposite party (Karumuru Venkateswami Versus Lanka Tripuriah 26 I. C. 359) relies. The other case quoted by the learned pleader for opposite party (*Narahari Ayyar Versus Vaithinatha* 49 I. C. 86) is not a case from a Small Cause Court and has on application.

I hold that the revision application lies.

2. For the applicant it is contended that no proper attachment was made, as the sewing machine and table were allowed to remain in the opponent's shop. Section 95 only applies when the attachment is actually effected. Reference is made to Kedarnath Versus Behari Lal A. I. R. 1925 Bombay 356.

That case however may be distinguished as no attachment was actually levied. In the present case the article was actually attached and the property entrusted to one Sajan a local merchant who gave security.

3. Reference is also made to Mohin Misser *vs.* Surendra Narain Singh 26 I. C. 296 where it was held that a party is not liable in damages for procuring an errroneous decision. That was as suit for damages for malicious prosecution.

In view of the express provisions of section 95 of the C. P.C. it does not apply to the facts of the present case.

4. Next it is contended that the order awarding damages must form part of the decree and cannot be passed subsequently. Reference is made to Kopilo Pato Versus Kasimbha Pato 17 M. L. J. 310 as an authority for that proposition.

This is a case under the old code and is obsolete. By the new code the words 'by its order' have been substituted for the words "in its decree", and this indicates that the award should no longer form part of the decree but should be embodied in a separate order Cf, Mullah's C. P. C. notes under section 95 beginning.

5. The judge has awarded 100/-for mental and physical damages and 50/-for expenses incurred in making the present application. The learned pleader for the applicant refers to Rattan Lal on Torts 9th edition page 200 where it is stated that there are 3 sorts of damages any one of which would be sufficient to support an action for malicious prosecution.

1. Damage to a man's fame.
2. Damage done to the person.
3. Damage to a man's property.

As the opposite party admitted he had not suffered in his business and the question of damage to the person does not arise the only head under which the present case can fall is the first.

The expression used by the learned Judge of the court below 'mental and physical damage' is not happily worded as there is no question of physical damage.

There can however be no doubt in view of the express provisions of section 95 C. P. C. that in the case of an attachment effected andwhich is found to be on insufficient grounds, compensation can be awarded and it matters very little by what name the damages are described.

It has been held by the Madras High court in Kumarasami Pilley Versus Udagar Naidu I. L. R. 32 Madras page 170 that an order of attachment found by the court to have been made on insufficient grounds must necessarily cause damage to the credit and reputation of the party against whom the order is made.

Cf. Nanjappa Chittiar Versus Ganapathi Goundan 12 I. C. page 507 (Madras).

It is not open to argument, that the court below had no authority to award compensation under section 95 C. P. C. if it found that the attachment was obtained on insufficient grounds. On the merits I do not propose to interfere. The lower court took evidence and came to the conclusion that the attachment was applied for on insufficient grounds and that Rs. 150 is the proper measure of damages.

Even in revision cases under section 25 of the Provincial Small Cause Courts Act it is not the practice to interfere with findings of fact, unless there was no evidence before the judge to support the finding or unless the finding is impossible and perverse. Cf. B. N. W. Ry Versus Manorah Bhagat Din Ram A. I. R. 1925 Allahabad 172.

Even the fact that the revisional court might take a different view of the evidence from that taken by the court of Small Causes in not a justifiable ground for interference in revision under section 25 of the Provincial Small Cause Court's Act Cf. Lobhaji Versus Narayan 48 I. C. 907 (Nag).

There are, in my opinion no reasons for interference in the present case and the application is consequently dismissed with costs.

CIVIL APPLICATION NO. 170 OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Seth Amar Chand son of Seth Ram Narayan Mahajan since deceased by his son and legal representative Seth Bal Kishan for self and as guardian of his two minor brothers Rameswar and

where it introduces a totally new, different and inconsistent case, and is made at a late stage.

There is no appeal against an order refusing leave to amend, and if a revision application can lie, it must be under the 3rd Sub clause of section 115, though the general rule is that interlocutory orders are not revised. My attention has been drawn to the cases reported in the All India Reporter for April 1925, Oudh at page 291 and for July, Madras, at page 585, as authorities for holding that the order in question is revisable; but I find that the decision in both these cases turned on specific points of an irregular exercise of jurisdiction, the former relating to permission to withdraw a suit, which was allowed on grounds, other than those mentioned in order 23 rule I: and the latter on the fact that an application to amend the plaint was refused, not in consonance with the principles I have enumerated above and on its merits, but merely because it was considered "belated and vexatious."

In fact these and other cases quoted to me are ones in which a judicial discretion vested in the Court has been exercised, regardless of the principles which should have guided its use.

What happened in this case was that the Plaintiff sued for the recovery of the balance of the sum secured by his mortgage and made Defendant No. 2 a party as he was a prior mortgagee (whom according to the usual practice, he should have offered to redeem, but did not), and the other defendants parties, as they had purchased some of the properties on which his mortgage was secured.

The reliefs claimed were the usual ones in mortgage suit. The causes of action sought to be introduced by the amended plaint, as against defendants Nos. 2 rnd 3, were that defendant No. 2 had fraudulently and collusively puchased one of the properties benami through defendant No. 3 and had then dismantled it; and the relief really sought was a declaration that the sale of

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This is a case under the old code and is obsolete. By the new code the words 'by its order' have been substituted for the words "in its decree" and this indicates that the award should no longer form part of the decree but should be embodied in a separate order Cf, Mullah's C. P. C. notes under section 95 beginning.

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CIVIL APPLICATION NO. 170 OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Seth Amar Chand son of Seth Ram Narayan Mahajan since deceased by his son and legal representative Seth Bal Kishan, for self and as guardian of his two minor brothers Rameswar and

Gopi Kishen of Ajmer ... ... Plaintiff—*Applicant.*

Versus

Ram Pal son of Nand Lal for self and legal representative of Radha Kishan deceased son of Bhajan Ram Mahesari, of Ajmer and others ... ... Defendants—*Opposite Party.*

Against S. J.'s order—*dated 13-10-1925.*

(*a*) An order refusing amendment of plaint is interlocutory and no revision lies.

(*b*) Leave to amend will as a rule be granted to enable the real question in issue between the parties to be raised on the pleadings and where no injury can be caused to the opposite party except such as can be sufficiently compensated in costs: and it will be refused, when leave is not sought in good faith, or when the amendment is not essential, or would occasion irreparable loss to the other side, or when it introduces a totally new, different and inconsistent case, and is made at a late stage. A.I.R. 1925 Oudh 291, 1925 Mad. 585 not followed.

V. G. Bapat and Pushkar Narain for R. B. Tikam Chand.
Nand Lal for Opposite Party No. 3.
R. S. Mathur for Opposite Party No. 4.
Suraj Karan and M. L. Capoor for Applicant.

ORDER

The applicants seek the revision of an interlocutory order of the learned First Class, Sub-Judge Ajmer, refusing to allow them to amend the plaint in certain particulars in suit No. 146 of 1920, which is a suit to enforce a mortgage.

The original plaint recited that on the 7th August 1906, certain properties had been mortgaged to plaintiff's firm by one Radha Kishan Ram Bhajan for Rs. 6000/- carrying interest at 6 percent per annum, and that Rs. 4295/7/- were due. The mortgage amount was repayable on the 27th August 1928. The prayer was for a personal decree, for a decree for sale of the mortgaged property, and for the balance, if any, from other properties of the mortgagor.

The defendants impleaded were legal representatives of the mortgagor, Seth Tikam Chand, being a prior mortgagor, Harak Chand, who was said to have purchased item No. 3 of the mortgagor, and Abhey Mal for a similar reason, in respect of property item No. 2. Defendant No. 5 was impleaded by an order of the Court.

The proposed amendments were the addition of 4 more defendants, on the ground that they were purchasers of some of the properties included in the plaint mortgage: and the inclusion of an allegation, or plea, to the effect that defendant No. 2 has lost his right to priority owing to his behaviour and fraudulent purchase of the property No. 3, through defendant No. 3, and his dismantling of it.

The addition of the defendants Nos. 4, 5, 6, 7, and 8, (as described in the amended plaint) was allowed, while the second prayer was refused, on the ground that it imported elements foreign to the original plaint.

A preliminary objection has been raised that the application is not competent under sectien 115 of the Code of Civil Procedure. The issues therefore are :—

(1) Does the application fall within section 115 of the Civil Procedure Code ?

(2) If it does, should the amendment prayed for have been allowed ?

I find on the first issue in the negative.

The application made to the Court below was under order 6 rule 17 of the Code. The principles embodied in the case law on the subject are, that leave to amend will as a rule be granted, to enable the real questen in issue between the parties to be raised in the pleadings, and where the injury can be sufficiently compensated in costs· and that it will be refused, when leave is not sought in good faith, or when the amendment is not essential, or would occasion irreparable loss to the other side,

where it introduces a totally new, different and inconsistent case, and is made at a late stage.

There is no appeal against an order refusing leave to amend, and if a revision application can lie, it must be under the 3rd Sub clause of section 115, though the general rule is that interlocutory orders are not revised. My attention has been drawn to the cases reported in the All India Reporter for April 1925, Oudh at page 291 and for July, Madras, at page 585, as authorities for holding that the order in question is revisable; but I find that the decision in both these cases turned on specific points of an irregular exercise of jurisdiction, the former relating to permission to withdraw a suit, which was allowed on grounds, other than those mentioned in order 23 rule I: and the latter on the fact that an application to amend the plaint was refused, not in consonance with the principles I have enumerated above and on its merits, but merely because it was considered "belated and vexatious."

In fact these and other cases quoted to me are ones in which a judicial discretion vested in the Court has been exercised, regardless of the principles which should have guided its use.

What happened in this case was that the Plaintiff sued for the recovery of the balance of the sum secured by his mortgage and made Defendant No. 2 a party as he was a prior mortgagee (whom according to the usual practice, he should have offered to redeem, but did not), and the other defendants parties, as they had purchased some of the properties on which his mortgage was secured.

The reliefs claimed were the usual ones in mortgage suit. The causes of action sought to be introduced by the amended plaint, as against defendants Nos. 2 and 3, were that defendant No. 2 had fraudulently and collusively puchased one of the properties benami through defendant No. 3 and had then dismantled it; and the relief really sought was a declaration that the sale of

this property by the mortgagor to defendant No. 2 (ostensibly to defendant No. 3) was void, and that this fact cost defendant No. 2 his priority as a prior mortgagee. The cause of action still continued to be stated as the 17th August 1906, and the 17th August 1908, the dates on which the martgage was executed and the mortgage amount became due.

The learned Sub Judge disallowed this second amendment, as he considered though in the original plaint defendant No. 2 was merely pro-forma, the change if made, would convert him into a real defendant on grounds foreign to the contentions in the plaint, would substantially alter the original claim, and would set up a distinct cause or causes, of action in respect of these defendants. He therefore thought that the prayers made should more properly form the basis of a separate suit.

As I have already stated one of the principles governing the allowing or refusing of leave to amend, is that the amendment sought should be consistent with the plaint as originally framed, and should not intriduce a different or inconsistent case and fresh causes of action. It is for the Court to which the application is made to decide whether it falls within this principle and to exercise a Judicial discretion in so doing: and where this has taken place, and application to amend has been considered in the light of those principles and has been refused or allowed, not capriciously or arbitrarily, but after a proper exercise of the Court's discretion, it can not be said that there has been an illegal or irregular exercise of jurisdiction, with which alone action 115 is concerned.

I think what applicant is really seeking is an appeal on the merits of the Sub-Judges order: but such an appeal does not lie: and since the order made appears to me to fall within the limits in which the original Court had jurisdiction to decide whether an amendment of the plaint should be allowed, or not, and did decide the point, and did not act, in an illegal or irregular manner: that this application is not competent.

I therefore dismiss it. Applicants will pay their own and all the other sides costs of the application.

CRIMINAL APPLICATION NO. 20 OF 1925.

BEFORE MR. S. J. MURPHY, I.C.S.,

Kazi Syed Shahbuddin son of Kazi Muniruddin of Ajmer.
Applicant.

Versus.

Syed Ala Rasool son of Khursand Ali at present at Ajmer.
Opposite Party.

Against C. M.'s—*dated 29-1-1925.*

(*a*) The Dewan of the Dargah is not an "Istimrardar" but a Jagirdar and the inquiry by the Commissioner about succession to this Jagir was in his character as a "Revenue Officer."

(*b*) The expression 'Revenue Court' is nowhere defined but it has been repeatedly ruled by the several High Courts, that the word 'Court' in S. 195 Cr. P. Code does not mean a 'Court of Justice' and having regard to the obvious purpose for which this section was enacted, the widest possible meaning should be given to the word and it will include a tribunal authorised to deal with a particular matter and empowered to receive evidence in that matter in order that a determination may be come to. 45 Cal. 585, 57 Cal. 872, 37 Bom. 365, 38 Bom. 642 relied on.

It is immaterial if the evidence is taken on oath or not. 27 I. C. 147 Foll.

R. S. Mithan Lal and Abdul Rashid for Applicant,
P. P. for Crown.

Raghu Nath and Pushkar Narain for the Dewan.

JUDGMENT.

A complaint was made to the court of the City Magistrate

Ajmer by the applicant that the present Dewan of the Durgah, Syed Ala Rasul who after an inquiry held by the Commissioner of Ajmer-Merwara in 1922 was recognised by the Chief Commissioner as Dewan, which orders have been confirmed by the Government of India, had obtained the said orders in his favour by means of using forged documents and by cheating. The complaint is very short and vague, but I am informed by applicant's pleader that the charge of forgery set up in paras 1 and 2 is based on applicant's belief that a certified copy of a Settlement record (a fresh copy of which has now been put in by the other side and is marked 'A') is not a true copy of the original record in the Pūnjab, a name in it which in the original is "Faiz Ali" having been rendered as "Faizal Ali".

Applicant has not however himself produced any certified copy of the record in question, either from the Punjab or from the Commissioner's record. The charge of cheating it is said, now more explicitly than in the complaint, is based on some other entries where the name is given in one case as "Faiju" an abbreviation, and in another as "Faizu khan Rajput". These entries have not however been put in. The learned Magistrate dismissed the complaint holding that it was an attempt to challenge the Commissioner's decision in an indirect manner and that sanction was necessary before it could be instituted.

The Dewan of the Durgah is not an Istimrardar but he is a Jagirdar and manager of the Durgah estates and as such enjoys exemption from certatin land revenue assessments in some 14 villages exclusive of 3 other villages—see page 598 of the Ajmer Regulations volume II. I therefor think that in the enquiry the Commissioner was clearly acting in his character as a "Revenue officer" under the Ajmer land Revenue Regulation 1877 which he is by definition, while by a notification No. 798 dated the 28th December 1877 the Commissioner has been investd by the Chief Commissioner for the purpose of the Regulation with any powers exerciseable by a civil court in the trial of suits.

Section 195 of the Criminal Procedure Code lays down that no "court" shall take cognizance of certain specified offences except on the complaint in writing of such court or of a court to which such court is subordinate, and the term "court" includes a civil, revenue or criminal court.

There is no question here of a civil or criminal court. The expression 'Revenue court' is not defined and is never used in the Ajmer land and Revenue Regulation which substitutes the term 'Revenue officer' but it has been repeatedly ruled by several of the High courts that the word 'court' does not mean a "court of justice" and having regard to obvious purpose for which this section was enacted the widest possible meaning should be given to the word, and it will include a tribunal authorized to deal with a particular matter and empowered to receive evidence in that matter in order that a determination may be come to (45 Calcutta 585, 57 Calcutta 872, 37 Bombay 365, 38 Bombay 642).

It has also been held that it is immaterial if the evidence taken is taken on oath or not (27 I. C 217)

It is admitted that the Commissioner in the matter of the proceeding with which I am now dealing cited all the parties concerned of whom the applicant was one, before him, and took and considered all the evidence which they *produced, though* evidence was not given on oath, and then made the report on which the final orders of the Chief Commissioner and the Government of India were based.

I therefore believe looking to the rulings which I have cited to the Commissioner's position and his powers and to all the circumstances of this inquiry he carried out and which I have stated that the Commissioner before whom the offences in question are alleged to have been committed, was at the time acting as court within the meaning of section 195 of the Criminal Procedure Code and consequently that no offence in respect of the sections of the I. P. C. enumerated in section 195 could be inquired into

without his written complaint or that of the Chief Commissioner. The complaint in this case purported to be under sections 420 and 446 of the Code.

The facts alleged about the document in question would really constitute an offence under sections 463 and 471 under which sections they would most properly fall and the learned City Magistrate was therefore right in holding that the previous complaint in writting of the Commissioner was necessary before he could take cognizance of them. Though section 420 is quoted no facts amounting to an offence of cheating are given in the complaint. I think the lower court's order is correct. I dismiss this application to revise it.

Note:—It has been brought to my notice that the Dewan of the Durgah is not technically the manager of the Durgah estate but he is the Jagirdar of certain villages under sanads No. 2 and No. 11 Pages 599 and 608 of the Ajmer Regulations Vol II. A note in terms of this order may be appended to the copies already granted.

CRIMINAL REVISION APPLICATION NO. 39 OF 1925.

BEFORE MR. S. J. MURPHY, I.C.S.

Natha son of Sardara Gujar of Nayanagar.

Complainant—*Applicant.*

Versus

Bala son of Kana and Mst. Jhamri widow of Kana Gujars of Nayanagar. ... *Opposite Party.*

Against D. M.'s—*dated 7-3-1925.*

(*a*) There is no Section in the Cr. P. Code under which Criminal Proceedings can be stayed till the decision of a Civil Suit between the parties.

Jasoda Nandan ... ... *for Applicant.*
Public Prosecutor ... ... *for Crown.*

DISTRICT MAGISTRATE'S ORDER.

I have seen the file of the lower Court. It appears that the criminal cases did arise out of the dispute concerning land in suit in the Civil Court.

I direct that the criminal proceedings against Bala applicant be stayed until the decision of the civil suit between the parties.

ORDER IN REVISION.

There is no section in the Criminal Procedure Code under which the learned Commissioner's order could be passed by him. I therefore set it aside.

CRIMINAL APPLICATION NO. 24 OF 1925.

BEFORE MR. S. J. MURPHY I.C.S.

Zahur Beg. *Versus.* Crown.

A. S. J.'s—*dated 23-2-25.*

A Chemical trace of Cocaine is a quantity so small that it cannot be quantitatively estimated, its presence only being detected by qualitative tests. Sale of such a substance cannot be called a sale of Cocaine.

Mirza Abdul Qadir Beg ... ... *for Applicant.*
14-3-25. Public Prosecutor ... ... *for Crown.*

ORDER.

The applicant has been convicted of selling an exciseable article, cocaine, without a license and has been sentenced to rigorous imprisonment for 2 months and a fine of Rs. 100/-. Assuming that the applicant did sell the packets in question it seems to me that the conviction is not substainable on the preliminary ground that the substance sold was not cocaine. The chemical analyser's report shows that each of the 7 packets contained ·5 of a grain and that in 5 out of the 7 traces of cocaine were detected, the rest of the substance being antipyrin. Now a chemical trace of a substance is a quantity so small that it cannot be quantatively estimated its presence only being detected by qualitative tests. I think this was not reasonably a sale of cocaine. It was one of antipyrin which is not an exciseable article with an infinitisimal adulteration of cocaine. Accused may have been guilty of cheating but this offence is not the one of which he has been convicted. I set aside the conviction and sentence. The fine if recovered should be refunded.

CRIMINAL APPLICATION NO. 33 OF 1925.

BEFORE MR. S. J. MURPHY, I. C. S.

Nannah son of Bahadur Gaindia and Gafur, sons of Bahadur and Allah Din son of Kadir Bux Musalmans of Beawar.

Accused Appellants—*Applicants.*

Versus.

Crown through Gafur son of Mohammed Musalman of Beawar.

Complainant Respondent—*Opposite Party.*

Against E. A. C.'s—*dated 24-11-1924.*

(*a*) To disbelieve a witness because he has on another occasion given a discrepant account of what happened is perfectly proper, but if it is desired so to contradict him, proof of what he said on the other occasion must be given and the discrepant version must be put to him. It is not sufficient for the trying Magistrate himself to have knowledge of former statements and proceedings and to disbelieve the witness on the strength of his own knowledge without complying with the legal procedure laid down for such a purpose. It amounts to an illegality which prejudices the accused to disbelieve his defence on the strength of evidence not recorded in the case and the conviction must be set aside.

R. S. Mithan Lal .. .. *for Applicant.*
7-7-25. Public Prosecutor ... ... *for Crown.*

ORDER.

The three applicants have been convicted under section 323 I. P. C. and were each fined Rs. 50 by the learned Magistrate who tried them On appeal the Sub-Divisional Magistrate reduced the fines to Rs 25 in each case. In his judgment he remarks that since the appellants had an opportunity of cross-examining the witnesses in a counter complaint made by the other side, he does not see why the evidence given in that case could not be used in this one. But I think the learned Sub-Divisional Magistrate's veiw is mistaken, and this is conceded by the learned Public Prosecutor who however contends that the trying Magistrate's procedure was a mere irregularity which would not vitiate the proceedings provided there was sufficient prosecution evidence to support the convictions.

The facts of the trial are that four witnesses were examined for the prosecution and nine for the defence The defence were disbelieved, D. W. No. 4 because his account of the matter differs from that given by his father in his counter complaint so with defence witness 7 and defence witness 8 because his evidence in this case differs from the testimony he gave in the other one and so with the remaining defence witnesses.

To disbelieve a witness because he has on another occasion given a discrepant account of what happened is perfectly proper but if it is desired so to contradict him, proof of what he said on the other occasion must be given and the discrepant version must be put to him. It is not sufficient for the Trying Magistrate himself to have knowledge of former statements and proceedings and to disbelieve the witness on the strength of his own knowledge without complying with the legal procedure laid down for such a purpose. It is also I think an illegality which prejudices the accused whose defence has been disbelieved on the strength of evidence not recorded in the case and the conviction must be set aside.

I do not think it is worth while ordering a new trial. The squabble out of which it originated was a petty one and no person was seriously hurt while the quarrel is now many months old.

I set aside the convictions and the fines which if recovered should be refunded.

CRIMINAL REVISION APPLICATION NO. 117 OF 1925.

BEFORE MR. S. J. MURPHY, I. C. S.

Gyana son of Guma 2. Panna son of Gyana 3. Urja son of Durga 4. Dunga son of Nimba and 5. Mana son of Karma Rawats of Naddwat ... ... *Applicants.*

Versus

King Emperor ... ... *Opposite Party.*

E. A. C., Beawar.

(a) The omission to take evidence offered by the accused under S. 208 of the Cr. P. Code is an illegality.

Against E. A. C.'s—*dated 24-11-1924.*

(*a*) To disbelieve a witness because he has on another occasion given a discrepant account of what happened is perfectly proper, but if it is desired so to contradict him, proof of what he said on the other occasion must be given and the discrepant version must be put to him. It is not sufficient for the trying Magistrate himself to have knowledge of former statements and proceedings and to disbelieve the witness on the strength of his own knowledge without complying with the legal procedure laid down for such a purpose. It amounts to an illegality which prejudices the accused to disbelieve his defence on the strength of evidence not recorded in the case and the conviction must be set aside.'

R. S. Mithan Lal . ... *for Applicant.*
7-7-25. Public Prosecutor ... ... *for Crown.*

ORDER.

The three applicants have been convicted under section 323 I. P. C. and were each fined Rs. 50 by the learned Magistrate who tried them On appeal the Sub-Divisional Magistrate reduced the fines to Rs 25 in each case. In his judgment he remarks that since the appellants had an opportunity of cross-examining the witnesses in a counter complaint made by the other side, he does not see why the evidence given in that case could not be used in this one. But I think the learned Sub-Divisional Magistrate's veiw is mistaken, and this is conceded by the learned Public Prosecutor who however contends that the trying Magistrate's procedure was a mere irregularity which would not vitiate the proceedings provided there was sufficient prosecution evidence to support the convictions.

The facts of the trial are that four witnesses were examined for the prosecution and nine for the defence The defence were disbelieved. D. W. No. 4 because his account of the matter differs from that given by his father in his counter complaint so with defence witness 7 and defence witness 8 because his evidence in this case differs from the testimony he gave in the other one and so with the remaining defence witnesses.

To disbelieve a witness because he has on another occasion given a discrepant account of what happened is perfectly proper but if it is desired so to contradict him, proof of what he said on the other occasion must be given and the discrepant version must be put to him. It is not sufficient for the Trying Magistrate himself to have knowledge of former statements and proceedings and to disbelieve the witness on the strength of his own knowledge without complying with the legal procedure laid down for such a purpose. It is also I think an illegality which prejudices the accused whose defence has been disbelieved on the strength of evidence not recorded in the case and the conviction must be set aside.

I do not think it is worth while ordering a new trial. The squabble out of which it originated was a petty one and no person was seriously hurt while the quarrel is now many months old.

I set aside the convictions and the fines which if recovered should be refunded.

CRIMINAL REVISION APPLICATION NO. 117 OF 1925.

BEFORE MR. S. J. MURPHY, I. C. S.

Gyana son of Guma 2. Panna son of Gyana 3. Urja son of Durga 4. Dunga son of Nimba and 5. Mana son of Karma Rawats of Naddwat ... ... *Applicants.*

Versus

King Emperor ... ... *Opposite Party.*

E. A. C., Beawar.

(*a*) The omission to take evidence offered by the accused under S. 208 of the Cr. P. Code is an illegality.

(b) Omission to record defence evidence when offered, is a point of law under S. 215 of the Cr. P. Code and the commitment should be quashed. 26 All. 177 relied on.

	Parmatma Swarup	... *for Applicant*
22-2-26.	Public Prosecutor	... *for Crown.*

JUDGMENT.

The facts of this case have been reported under section 438 of the Criminal Procedure Code, by the Additional Sessions Judge, with a recommendation that the commitment should be quashed on the ground that the learned Magistrate has disregarded the provisions of Section 208. The learned Public Prosecutor who appears for the Crown, supports the report. It appears that the accused in the matter whose case was being inquired into by the Magistrate First Class Beawar the charge being under sections 325/149 I. P. C. prayed to be allowed to lead defence evidence. The learned Magistrate however passed no order on their application, framed a charge and committed them to the court of Sessions. The provisions of section 208 are, that the Magistrate holding an inquiry shall take all such evidence as may be produced by the prosecution or on behalf of the accused. The omission to do so is a serious illegallity and I would point out to him that whenever an application is made he must pass an order on it.

I think the omission to examine the witnesses offered for the defence is a point of law under section 215 of the Code (26 Allahabad 177), and that the commitment should be quashed I therefore set it aside and direct the Magistrate to resume his enquiry into the case from the point when he refused to call the defence witnesses.

CRIMINAL APPEAL NO. 10 OF 1925.

BEFORE MR. S. J. MURPHY, I. C. S.

Sadey Khan ... ... Accused—*Appellant.*

Versus

Crown Complainant—*Respondent.*

Against A. S. J.'s.

(a) The case reported in 29 All. 434 which lays down that a confession or statement of the accused may form the basis of conviction even when there is no corroboration has not been followed elsewhere in India and was of an exceptional nature.

The ordinary rule of caution is that to form the basis of a conviction some corroboration of such a statement is necessary.

B. D. Khanna ... . *for the Appellant.*
17-8-25. Public Prosecutor .. . . *for the Crown.*

JUDGMENT.

Appellant has been convicted under section 302 I. P. C. and has been sentenced to transportation for life and to a fine of, Rs 500/- of which Rs 300, if recovered is to be paid to deceaseds heir as compensation.

The facts found were that 2 Mahajans of Ararka village named Dhana Lal and Shivdas were murdered at a place about 2 miles from that village on or about the 26th December 1924. There seems to be no doubt that this crime was committed, for it has been shown that these two men set out on that day from that place intending to visit the neighbouring hamlets and the village of Narwar and that they never returned while about a week later their mutilated bodies were found at a lonely spot in the jungle and were then still just identifiable, though they had been attacked by wild animals. Some of the victims' clothes and

their shoes were also recovered from near the place where the bodies were found. The medical evidence shows that death was probably due to the victims throat being cut. All these circums tances prove that Dhanna Lal and Shiv Das were murdered as alleged by the presecution. No motive has been made out. The one suggested in the case of Dhanna Lal is that he was on bad terms with some other Mahajans of his village, who so desired his death. Shivdas it is suggested was murdered because he happened to be with Dhanna Lal at the time. Originally 5 more persons including 2 Rajputs and 3 Mahajans were committed to the Sessions court but the cases against them were withdrawn for lack of evidence against them by the Public Prosecutor. The present appellant apparently had money dealings with both of the victims but it does not appear that he was on bad terms with them. There was also a civil suit going on between Dhanna Lal and some Mahajans at Narwar, but as remarked by the learned Sessions Judge this point has not been properly investigated.

Appellant has made two statements which inculpate him. One was recorded under section 164 Cr. P. C. and the second was made in the Committing Magistrate's court. There is good reason to believe that the former was made when the inducement of being made an approver had been held out to the appellant and it has rightly been ignored by the learned Sessions Judge. It should not have been admitted on the record. It was made on 6-1-25. The second statement was made to the Committing Magistrate on 7-4-25 and begins with the events of the day of the murder when appellant went into the village and was asked by the Rajputs and others to find out if the victim Dhana lal was going out that day which he did. He returned home and present ly was joined by Barisalsingh and ultimately by the others and presently they saw the two victims coming and appellant was sent to meet them, apparently with the object of diverting Sheodas who was not wante In this he failed but ultimately accompanied th to the sp they were both ambushed

& killed by the two Rajputs. All present were made formally to strike the bodies, to involve them in the crime and the Rajputs were paid something by one Jeth Mal. The bodies were then stripped of their clothes, which were burnt and were burried in the sand.

According to this statement the actual murderers were Barisalsing and Sheo Singh who committed the crime for money paid them by the mahajans, but if the statement is true the maker is equally guilty for it is plain from it that he helped the murderers and acted as a decoy and knew what was intended. In the Sessions court appellant said that he had made this, as well as the other statement at the instance of the Thanadar who threatened to beat him, that he never pointed out the place where *the shoes were found, and that he had no part in the murder.*

Relying on the case reported in I.L.R. 29 Allahabad page 434 the lower court has held that a confession of statement may form the basis of a conviction even when there is no corroboration but I think this case has not been followed elsewhere in India and was of an exceptional nature. The ordinary rule of caution is, that to form the basis of a conviction some corroboration of such a statement is necessary and I am required to find if it is available in this case or not, The learned Sessions Judge has found it in the discovery of deceased's shoes, the ashes, skin and hair the bath appellant took in the Baori and his guilty conduct. I think witness No. 7 who says he saw his uncle burn some papers on the evening of Amawas is worthless. He is a small boy, is unlikely to know a Hindi date and does not know what papers were burnt. The evidence as to the bath is equally unconvincing for the date is uncertain. The evidence of witness Bhairde is I think inconclusive and the same remark applies to that of Sheo Das and Moti relied on by the learned Sessions Judge The remarks imputed to appellant by these witnesses might be made by any one who after the murder was or was likely to come under suspicion as appellant clearly was. The

only real corroboration is to be found in the production of the deceased's shoes and other things at the scene of the offence. The find of the bodies appears to have first been made by Lachman the brother of Dhanna lal who was accompanied by a Sewak of Kansru who has not been examined and one Sukha, owing to the Sewak having noticed crows and kites circling round the place. The find was reported to the police and witness Mustapha khan arrived next morning. He found the bodies, some clothes and some burnt cloth on the spot. The Thanadar arrived that night and took up the investigation on the 3rd January. According to him Dhanna lal's shoes were found some 100 paces from the spot where the corpses had been, on the appellant's information, one being pointed by the appellant and the other found by a constable, but the actual course of events is not clear from his statement. Similarly with the bloodstained sand, stones and shoes of Sheo Das which were found on the 7th January.

The 'panch' witnesses on the point are Jagan Nath and Dhul singh. Jagan Nath says that after taking them to a wrong place appellant took them to another and said Sheodas' shoes would be found there and the shoes were accordingly dug out from that spot, together with some bloodstained sand and stones and some hair. Dhul singh says that he went with the party when appellant said Dhanna lal's shees would be found near the hillock, and he found one accordingly and a constable found another. This was on the 5th January, as to the events of the 7th he gives the same account of the finding of Sheodas' shoes which he also says were burried, as does witness Jagannath.

Both these witnesses speak of the finding of the sword but the only suspicious circumstance is that it was not in its usual place but burried and its hiding place was pointed out by appellants wife Chotki and his nephew Boda. The finding of the shoes is I think the only substantial corroboration of the statement made to the commiting Magistrate, and the question is whether

these two pieces of evidence taken together are enough to convict the appellant..

The statement itself is long and detailed and contains many recitals which could not I think have been invented by an innocent man and since it is clear that Sheodas' shoes were burried in the sand and could not have been discovered by ordinary search as they in fact were not, I believe that if this evidence is true, it is sufficient taken in conjunction with the statement, to corroborate the latter and to convict the appellant. The testimony of the parade witnesses seems to me to be simple and independent and has been believed by the learned Sessions Judge and 2 of the 3 assessors who heard it and who were of opinion that the appellant was guilty. I see no reason to reject it and I think that the conviction has been properly had. I confirm it and the sentence and dismiss this appeal.

CRIMINAL APPEAL NO. 15 OF 1925.

BEFORE MR. S. J. MURPHY, I.C.S.

Kammu son of Maula Bux Accused... ... *Appellant.*

Versus.

Crown... ... ... *Respondent*

Against A. S. J.

(a) It is a well known fact and has often been noticed judicially, that rape is of all false charges the one most easily made and for an innocent accused, the one most difficult to refute; and it is known that such charges are often falsely made for the most trivial motives, though *prime facie* it would seem that they would not be lodged lightly, owing to the disgrace which having been the victim of such an offence generally entails.

(*b*) Very great weight is consequently attached in such cases to the character of the prosecutrix and where, as here, she is a grown (up) woman and no physical signs of the actual rape can be expected from the medical evidence, to any marks of injury on her person and to the general probabilities of the cases to be deduced from the reputation of the prosecutrix,

Appellant unrepresented.
16-11-25. Daya Shanker for Crown.

ORDER.

Appellant has been convicted under section 376 and 511 I. P. C. of an attempt to commit rape and has been sentenced to 4 years rigorous imprisonment and a fine of Rs. 50. He was a tonga driver and the facts alleged against him are, that when taking a Brahmin woman alone in his tonga to Pushkar he drove aside into the Nursery Gardens and there raped her. At least this was the prosecution case. The main difficulty is I think that Mst. Mori the complainant was not examined in the Sessions court. Her statement was recorded by the Commiting Magistrate and the accused who was undefended in the inquiry, did not cross examine her. At the Sessions trial it was said that she could not be found and her statement to the Commiting Magistrate was put in under section 33 of the Evidence Act. Though I realize that there must always be a difficulty in procuring the attendance of pilgrims from distant parts, such as Mst. Mori, I think that more determined efforts should have been made to secure her attendance or to show, as is quite possible, that she gave a false address.

It appears that no security was taken for her attendance after she was examined by the Magistrate and her address on the deposition is very vague. Assuming however that her statement is admissible there are certain difficulties in the case. In her deposition Mst. Mori describes a fully completed rape though it is clear her resistance could not have been very serious while in her complaint to the police she only alleged that accused had

caught hold of her and gagged her. Her complaint according to their evidence, made to witnesses Sawatri Pershad and Ram Chandera and others, immediately on her arrival at Pushkar and just before her complaint to the police was recorded was one that she had been raped. The learned Sessions Judge considers that these witnesses have exaggerated what they heard and is not satisfied with their evidence and he thinks that accused attempted to rape Mst. Mori but did not actually rape her as he was put on the "Soonies oath" which he considered sacred, but this findings is against the complainant's sworn testimony. The Assessors were divided in opinion. Two of them thought an offence under section 354 only had been proved while the remaining two considered accused guilty of rape. Accused has admitted that he drove the complainant to Pushkar in his tonga but has denied that he assaulted her in any way and has explained the charge against him by saying that Mst. Mori had promised to pay him Rs 1/8 for the trip and only paid him Annas 8 and that in consequence he quarrelled with her which led to her making the complaint.

It is a well known fact and has often been noticed judicially that rape is of all false charges the one most easily made and for an innocent accused one most difficult to refute and it is known that such charges are often falsely made for the most trivial motives, though prima facie it would seem that they could not be lodged lightly owing to the disgrace which having been the victim of such an offence generally entails. *A very great weight is consequently attached in such cases* to the character of the prosecutrix and where, as here she is a grown woman and no physical signs of the actual rape can be expected from the medical evidence, to any marks of injury on her person and the general probabilities of the case to be deduced from the reputation of the prosecutrix. There is no evidence here of any injury caused to Mst. Mori owing to her resistance to accused's acts. From her account given in the deposition it

would appear that she made little resistance or none or at most only protested for, otherwise the offence could not have been committed as described and practically nothing is known of her character or station in life. It is also a fact that she has given contradictory accounts of the offence she complained of on different occasions, and it seems probable since she could not be traced at the address she gave, that she was concealing her real one. Further, neither the Judge nor the Assesors in the court below were in a position to assess her credibilty by seeing her and hearing her give evidence and her statements even have not been tested by cross-examination. It seems to me that in the circumstances of the case which depends entirely on the prosecutrix's statements for the rest of the evidence is either circumstantial or as to the terms of her complaint it is extremely doubtful if Mst. Mori was raped or even criminally assaulted and that the evidence was not sufficient to sustain a conviction.

I reverse the conviction recorded against and the sentence passed upon appellant, acquit him and direct that he be discharged.

MISC CIVIL APPEAL NO. 5 OF 1925.

BEFORE MR. S. J. MURPHY, I.C.S.,

Seth Kalyan Mal Daddha son of R. B. Seth Sobhag Mal Daddha Oswal of Ajmer proprietor of the firm of Chimausi Sobhag Mal of Pertabgarh. ... ... Defendant—*Appellant*

Versus.

Seth Panna Lal son of Seth Tilok Chand proprietor of the firm of Fattaji Tilok Chand Oswal of Mandsaur.—*Respondent.*

Against A. D. J.'s—*dated 25-3-1925.*

The H. C. is empowered under S. 151 C.P.C. to remand a case to the Lower Appellate Court in the interests of justice.

	V. G. Bapat	... *for Appellant.*
3-8-1925.	Raghu Nath	... *Respondent.*

ORDER.

The plaintiff filed this suit basing his claim on a foreign judgment and decree of the Partabgarh State court. This decree was originally passed on the 31st July 1916. It was reviewed on 8th May 1919 and one Bhairoulal was ordered to pay Rs. 5300 out of the total sum decreed and plaintiff was ordered to give credit for Rs. 993-11-0.

The plaintiff filed the judgment of the Partabgarh court and also a certified copy of its decree as the basis of his suit and issues were raised. Issues 1 and 1 (a) were however argued first being issues of law, and the original court found that the suit was not maintainable, for there was no provision in the decree for the credit of Rs. 993-11-0 allowed in the judgment and the decree was not therefore in accordance with the judgment and offended against the provisions of section 33 and Order 20 rules 6-7 and section 13 (d) and (f) of the Code. This point then raised whether basing the suit on the judgment alone is not sufficient, has also been considered and held against the plaintiff. The suit was therefore dismissed.

There was an appeal to the District court. The learned Additional District Judge who heard it raised two issues :—

1. Was the suit not maintainable under the provisions of section 13 C. P. C.
2. Was the court right in not giving an opportunity to the appellant to get the decree corrected so as to bring it into confirmity with the judgment. The finding on the first issue was that the suit was not maintainable an on the second that the " court was not right ". T

learned Additional District Judge however then set aside the lower court's decree and remanded the case purporting to act under Order 41 rule 23 for disposal on the merits.

Since the preliminary point on which the suit failed was its maintainability and the learned Judge found, with the court below that it was not maintainable, I do not understand how this order which could only be made if the court found in the plaintiff's favour in the preliminary point, came to be made. Further the remand was due to the plaintiff's laches in suing on discrepant documents, yet the respondent was ordered to pay the plaintiff's costs as well as his own. I think it is evident that the learned Additional District Judge was not quite clear in his own mind what should be done and has consequently passed an impossible order.

As far as I can gather from his judgment, what he intended to hold was that the court below when it found that the suit was not maintainable, owing to the discordance between the judgment and decree should have given plaintiff an opportunity to make good this defect, either by giving him permission to withdraw the suit with leave to bring a fresh one, under Order 23 rule 1 or by giving him time to get the Partabgarh court's decree corrected and to put in the corrected decree, or in any other way which might be feasible, so as to allow the suit to be tried on the merits, but if so he should not have found as he did, on the point of maintainability; for this has given rise to the difficulty I am now faced with and the further difficulty that there are now two concurrent findings on the point of maintainability, against which there is no appeal under the Ajmer Regulation, and which I cannot consider.

I believe however that I am entitled to consider the legality and propriety of the order made in appeal by the learned Additional District Judge in the interests of justice and under section

151 of the Civil Procedure Code and to order a remand under that section, to meet the difficulties of the case and to ensure the passing of a proper order in appeal, because one of the several alternatives I have mentioned above was what was really intended, probably the one of allowing time for a correct decree to be put in, for I am told that such a decree was offered at the hearing of the appeal and that plaintiff's pleader was told to present it to the court below. If this was so the proper course would have been for the Appellate court to fiind on its admissibility and effect, after allowing any amendment of the pleadings which might be necessary and if it then found in plaintiff's favour on the point of maintainability to remand the suit. But this is only a suggestion and some other course may be the proper one.

It is I think in any case necessary in the interests of justice to reverse the appellate court's decree and to remand the appeal to that court for a proper disposal of the questions before it and such a remand is covered by section 151 of the Code. I reverse the District court's order and remand the appeal to it for disposal. Plaintiff to pay all his own and the respondents costs so far incurred.

CIVIL SECOND APPEAL NO. 24 OF 1925.

BEFORE MR. W. T. W. BAKER.

Seth Gulab chand since deceased represented by his son S. Panna lal Mahajan of Beawar.

2. Seth Dhul chand son of seth Nand Ram Mahajan of Beawar ... ... Plaintiffs.—*Appellants.*

Versus.

Mukand Behari Lal son of L. Muket Behari Lal Kayasth of Ajmer ... ... Defendant.—*Respondent.*

learned Additional District Judge however then set aside the lower court's decree and remanded the case purporting to act under Order 41 rule 23 for disposal on the merits.

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I believe however that I am entitled to consider the legality and propriety of the order made in appeal by the learned Additional District Judge in the interests of justice and under section

151 of the Civil Procedure Code and to order a remand under that section, to meet the difficulties of the case and to ensure the passing of a proper order in appeal, because one of the several alternatives I have mentioned above was what was really intended, probably the one of allowing time for a correct decree to be put in, for I am told that such a decree was offered at the hearing of the appeal and that plaintiff's pleader was told to present it to the court below. If this was so the proper course would have been for the Appellate court to fiind on its admissibility and effect, after allowing any amendment of the pleadings which might be necessary and if it then found in plaintiff's favour on the point of maintainability to remand the suit. But this is only a suggestion and some other course may be the proper one.

It is I think in any case necessary in the interests of justice to reverse the appellate court's decree and to remand the appeal to that court for a proper disposal of the questions before it and such a remand is covered by section 151 of the Code. I reverse the District court's order and remand the appeal to it for disposal. Plaintiff to pay all his own and the respondents costs so far incurred.

CIVIL SECOND APPEAL NO. 24 OF 1925.

BEFORE MR. W. T. W. BAKER.

Seth Gulab chand since deceased represented by his son S. Panna lal Mahajan of Beawar.

2. Seth Dhul chand son of seth Nand Ram Mahajan of Beawar ... ... Plaintiffs.—*Appellants.*

Versus.

Mukand Behari Lal son of L. Muket Behari Lal Kayasth of Ajmer ... ... Defendant.—*Respondent.*

Against A. D. J.'s—*3-8-1925.*

(*a*) A Court is justified in applying any law that may be applicable to the facts before it, but it is not so justified when the facts necessary for a decision on a point of law are neither pleaded nor proved. ..

(*b*) An antecedent debt means a debt antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. A borrowing made on the occasion of the grant of a mortgage is not an antecedent debt. 39 All. 437 foll.

(*c*) Limitation for a suit based on pious obligation of a son to pay is 6 years under article 120 of the Limitation Act and limitation runs from the death of the father. 16 Madras 99 and 8 M.L.J. 64 relied on.

Ghisoo Lal ... ... *for Appellant.*
12-7-26. Pushkar Narain ... ... *for Respondent.*

JUDGMENT.

The plaintiffs sued to recover Rs. 1600/- on a mortgage deed executed by defendant's grandfather Lala Badri Lal.

The Sub Judge of Beawar found that Badri lal was incompetent to execute the mortgage without the consent of his coparceners and so the document was inoperative as a mortgage but held that defendant was bound by a pious obligation to pay the debt of his grand father L. Badri lal and passed a decree for the recovery of the amount from the assests of L. Badri lal in the hands of defendant and from any seperate or self acquired property of Lala Badri lal.

The defendant appealed. In appeal the Additional District Judge Ajmer held that as the question of pious obligation has not been raised in the pleadings the lower court was not justified in raising the plea and basing its judgment upon it and he accordingly reversed the decree.

The plaintiffs make this second appeal. It may be stated at the outset that as the plaintiffs did not appeal or put in cross objections as to the findings that L. Badri lal was competent to mortgage the property, that question can not be raised now and

the case must be dealt with solely on this question of pious obligation. That however is putting it too widely for the real question in this appeal is whether in the present suit a decree based on the pious obligation of the defendent to pay his grandfather's debt could be passed. If so the case would have to be remanded for findings on the other issues, which have not been dealt with by the lower Appellate court.

The case has been argued at length and a number of rulings quoted most of which do not assist in the determination of the only point before me.

It is *contended* on behalf of the appellants that the liability of the defendants is p rely a question of law and there need be no reference to a pure question of law in the pleadings, reliance is placed on the case of Gauri Teh Vs Sri Ram A. I. R. 1926 Nagpur page 265.

That case however lays down that a point of law must be applicable to the facts pleaded and proved.

It is quite a different matter when the point of law depends on facts which are not pleaded and on which there is therefore no issue and consequently no proof.

I agree that a court is justified in applying any law that may be applicable to the facts before it but it is not so justified when the facts necessary for a decision on a point of law are neither pleaded nor proved.

There was no alternative case of pious obligation and in order to justify a decree based on the sons pious obligation to pay the debt of the father certain facts are necessary to be proved and it is open to the sons to raise various defences.

It must be shown that there exists an antecedent debt which means a debt antecedent in fact as well as in time, that is to say that the debt must be truly independent and not part of the transaction impeached. A borrowing made on the occasion of the

grant of a mortgage is not an antecedent debt C F. I. L. R. 39 Allahabad 437, 447, 449.

This eliminates the sum of 242/- which was borrowed at the time of the execution of the mortgage in suit but the defendant had no opportunity of raising this plea.

It is for the alienee to prove that the antecedent debt existed and as the present mortgage is mostly made up of amounts due on the previous mortgages there may be an antecedent debt in the present' case but it is then open to the sons to prove that the debt was contracted for an immoral purpose. As the suit was not based on pious obligation the defendant had no opportunity of alleging this.

Again the limitation for a suit based on pious obligation is 6 years under Article 120 of the limitation Act. It is contended on behalf of the respondent that the suit is barred by limitation because the mortgage is dated 1905 and was payable in 1909. For the appellant it is contended that the limitation would be the same against the sons as against the father. The law however is that limitation runs from the death of the father Cf. Natasayyan Vs. Ponnusami I. L. R. 16 Madras page 99 and 8 M. L. J. 64.

The question of limitation has not at all been considered. The date of L. Badri lal's death has not been stated in the judgement or in arguments and I have not been able to find it on the record. It is not possible to say whether the suit is barred by limitation or not.

It will thus appear that the learned Judge of the first court applied the law to facts which were not before him and that the defendants had no opportunity of meeting the case of pious obligation which was never set up in the pleadings. This being so the decree of the first court obviously cannot stand, not being passed on evidence and so the lower appellate court was right in setting it aside.

No amendment in the pleadings was asked and so the case cannot go back for retrial.

I confirm the decree of the lower appellate court and dismiss the appeal with costs.

CIVIL SECOND APPEAL NO. 18 OF 1925.

BEFORE MR. S. J. MURPHY, I. C. S.

1. Mota son of Rupa Rawat.
2. Urja son of Rama Rawat.
3. Lala minor son of Doola under the guardianship of Mota Rawat of Kiranipura Ajmer. Defendants ... *Appellants.*

Versus.

Ram Kishen son of Ganga Pershad Agarwal of Ajmer. Plaintiff—*Respondent,*

Against A. D. J.'s.

(*a*) A usufructuary mortgage is a parting with proprietory rights and creates an exproprietory tenancy within the meaning of S. 41 of the Ajmer Land Revenue Regulation. 5 I.C. 503 foll.

Proprietory rights are made up of the right of possession, the right of enjoyment and the right of disposition.

(*b*) To allow defendants to escape a liability by an omission to plead a status which is theirs, by refusing to take a judicial notice of a provision of the statutory law would be an abuse of the powers of the Court and a defeating of the ends of justice within the meaning of S. 151 C.P.C.

ORDER.

The suit was to recover Rs. 486/- rent due for 3 years from defendants as tenants of some land which their predecessors in

interest had mortgaged usufructuarily to plaintiffs' ancestors in 1890, which it was asserted had since been leased at a yearly rent of Rs. 162/.

The defendants denied the claim, pleading that they had never been plaintiffs or his predecessors' in interest tenants and had never paid any rent on account of this land.

The issues framed were:—

1. Are defendants plaintiffs' tenants ?
2. If so how much rent is due to plaintiffs ?
3. A general issue ?

The court found that Rupa the defendant's ancestor, had mortgaged the land in 1890 and 1893, and that the mortgages were proved, also that a lease for 5 years dated 18th November 1893 was proved and decreed the claim. On appeal the learned Additional District Judge considered two issues which do not really help the case as they are very vague and he held that the rent note of 1897 had not been proved but that there was an earlier one of 1890 which being 30 years old, did not require proof of execution, and which showed that Rupa after his mortgages retained possession as a tenant and further that Rupa was not an ordinary, but an exproprietory tenant under section 41 of the Ajmer land Revenue Regulation of 1877 in that by executing the usufructuary mortgages, he had parted temporarily with his proprietory right in the holding while continuing in possession, and had thus acquired a right to occupy the land on a fixed rent as provided by that section and could plead no adverse possession against his landlord. He therefore held that plaintiff could sue for rent, but only at a certain rate and that since this rate had not been adjudicated on by the lower court, there should be a remand for disposal after recording evidence and otherwise the appeal should be dismissed. This is an irregular order not warranted by the terms of order 41 to whose provisions I invite the Learned Acting Additional District Judge's attention. The

points made in the memo of appeal were that the plaintiffs having failed to prove the lease they pleaded, a new plea should not have been introduced by the Appellate court and that the defendants were not ex-proprietory tenants.

I think the issue whether the defendants are expropriectory tenants is the one that goes to the root of the case and it is the one which has been most strenuously argued before me. If they are expropriectory tenants the next question is, should the court have raised this question which is not mentioned in the pleadings or even in the memo of appeal to the District court, at the hearing and if they are not such tenants, is the suit with in time ?

Section 41 of the Ajmer land Revenue Regulation runs:—

"Any person who may have...........lost or parted with his proprietory rights, either temporarily or permanently and has since continued in occupation of any of the land comprised in such holding which as proprietor he retained under his own cultivation, shall have a right of occupancy in such lands at a rent five annas four pies in the rupee less than the prevailing rate payable by tenants at will for lands of similar quality and with similar advantages in the neighbourhood; such persons are hereinafter called "ex–proprietory tenants."

I think the object of this enactment is plain. It is similar to the provisions of several of the "Rent Acts" which are in force in other provinces and its object is, as far as possible to preserve on the land at a fair rent the original peasant or other owners who cultivated it.

The mortgages in this case are usufructuary and although there is no direct evidence for the whole period since 1890 I think it is fairly certain on what there is that Rupa and his descendants have been in cultivating possession ever since. The question therefore is whether the execution of an usufructuary

mortgage is a losing or parting with proprietory rights, either temporarily or permanently ?

There is no ruling of this court on the point, but it was once referred to the Allahabad High court under the Ajmer Courts Regulation and that court's ruling is to be found reported at 5 Indian Cases page 503.

This decision which is of the year 1909 was by Richards and Karamat Husain JJ. Richards J. held that an usufructuary mortgage was a parting with proprietory rights and so created an exproprietory tenancy while Karamat Husain J. held in the opposite sense, and Reechards J. being the Senior Judge, his opinion prevailed. This therefore must be taken to be the current of decision on the point and Richards J. mentions that it was similar before the reference came before him, though on what authority, though some there must have been is not stated. The only other authority consists of two cases of the Allahabad High court which are discussed by Richards J. and which were given on a section of the U. P. Rent Act wherein similar, though as pointed out by Richards J. not exactly similar, language was used.

The determining consideration in section 41 is a loss either temporarily or permanently, of proprietory rights and 'proprietory' rights may be considered as a bundle made up of the right of possession, the right of enjoyment and the right of disposition. Under the Transfer of Property Act section 58 mortgages are of 4 kinds. (1) Simple (2) by conditional sale (3) Usufructuary and (4) English. In the case of (1) a right of disposition is parted with, of (2) all three rights pass, the right of disposition in a modified form, of (3) two of the three essential rights are transferred and of (4) there is an absolute transfer, subject to a right of repurchase on condition, retained by the mortgagor. It is plain that mortgages falling within (2) and (4) are included in section 41. In (1) only a portion of the proprietory rights, the right of disposition, is alienated while in (3) the case of the usufructuary mortgage, two of the 3 elements of ownership are

transferred, possession and enjoyment. I think the answer really turns on the meaning of 'proprietory rights'. If everything included in 'ownership' is meant there, with the I think somewhat doubtful exceptions of English mortgages by conditional sale I say doubtful for even in these cases there is some reservation, nothing but a sale or exchange comes within section 41. But if this is so, there is no meaning in the words 'temporarily or permanently' used in the section and something must have been meant by this expression. Looking to the evident object of the section, and to the fact that it was enacted in 1877, 5 years before the Transfer of Property Act defined and crystallized the law of mortgage in India, I agree with the view taken of it by Mr. Justice Richards and think the expression 'proprietory rights' need not and was not meant to include the whole bundle of rights coming under ownership, and that they cover a portion of such rights and include a usufructuary mortgage. I therefore find that defendants are exproprietory tenants and have a right of occupancy at the prescribed rent

The next point is whether the lower appellate court was right in raising this question and in finding on it.

Under section 151 of the Code it is an inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent an abuse of the process of the court and to allow defendants to escape a liability by an omission to plead a status which is theirs, by refusing to take judicial notice of a provision *of the statutory law would* be an *abuse of the process* of the court and a defeating of the ends of justice while under Order 41 rule 33, an appellate court has power to pass any decree, or make any order, which ought to have been passed or made. I think the First Appellate court acted within its powers.

Its order was not however regular. What is meant to do was to make an order under order 41 rule 25 and to send down the issue. What was the annual rent for the 3 years in question

payable by the defendants under section 41 of the Ajmer land Revenue Regulation.

I accordingly frame this issue and send it to the Lower Appellate court for a finding. Either party may lead evidence and the finding should be submitted before the 15th February 1926. The order as to costs will be made when this courts decree is framed.

The finding called for has now been returned by the District court and I have heard the parties. The learned Additional District Judge has found the value of the 3 years rent on the basis of the annual rent per bigha of dry crop land. Mr. Ghisu lal accepts this valuation. The other side object to it and urge that the value should be on the basis of the landlord's share of the crop to be deduced from the annual crop inspection reports. But there are only estimates and not actual findings, and even if relevant, which I doubt as there is no other evidence--would be of little value. Parties were given leave to lead evidence and it was the duty of each to prove its case. I accept the learned Additional District Judge's judgement that 3 years rent should be Rs. 94-4-10 I vary the lower appellate and the original court's decree and grant the plaintiffs one for Rs. 94-4-10 with proportionate costs throughout. The plaintiffs will pay the balance of their costs and the other side will pay plaintiff's costs which have been allowed and their own.

CIVIL APPEAL NO. 13 OF 1925.

BEFORE MR. S. J. MURPHY, I. C. S.

1. Abdul Rahman son of Nanne Khan Mohamedan of Ajmer.
2. Ghulam Ali son of Abdul Ali Mohamedan of Ajmer.

Applicants.—*Appellants.*

Versus.

The Collector of Ajmer-Merwara Ajmer.

Opposite Party.—*Respondent.*

1. In land acquisition cases the ordinary principle is that the prevailing market rate for building sites in the vicinity should be awarded with an increase or decrease according to the advantages or drawbacks of the land acquired from the point of view of the purpose for which it can be used to the best advantage.

2. When a plot to be acquired has changed hands shortly before the acquisition, it is evident that the price then paid is a very good index of its value in the absence of special circumstances.

3. It cannot be assumed as a general rule that sales from widows are usually at a ruinous rate for the widows.

Mr. P. Swarup . ... *for Appellants.*
4-11-25. Government Pleader ... ... *for Crown.*

ORDER.

This is an appeal against the District Court's award of compensation for the acquisition of a plot of land adjoining the distillery taken for an extension of those premises. The area is 6227 Square yards and the original claim was for Rs. 1 per square yard. The land acquisition officer awarded compensation at the rate of annas 1 and pies 1½ per square yard and on appeal the District court raised the rate to annas 2 pies 3 to the square yard. The only point now disputed is the rate per square yard which it is claimed should have been annas eight on the basis of building site value.

The ordinary principle is that the prevailing market rate for building sites in the vicinity should be awarded with an increase or decrease according to the advantages or drawbacks of the land acquired from the point of view of the purpose for which it can be used to the best advantage.

There are unfortunately very few sales to guide the court in this matter. It is said that in 1912 the B. B. & C. I Railway

acquired some land for gangmens quarters at 8 annas per square yard, but the details of this transaction are not in the record.

Another instance is a sale of 4000 square yards effected on 8-6-24 at the rate of 14 annas per square yard. But this sale includes a sixth share in a well which must considerably enhance the value of the land and was made after the date of the notification which was issued on the 23rd February 1924.

Another sale of one bigha and 14 biswas was made in 1923 to Babu Sarup Narayan at Rs. 1-0-2 per square yard. Both these plots have been found to be much superior to and with better access then the one now acquired. This was however bought on the 22nd July 1922 by the applicants at the rate awarded by the land acquisition officer and the real issue is whether this was a true market value and if it was whether in the interval between the sale the value has appreciated to what is now claimed. The interval between the sale and notification was only a few months and it is seriously argued that there has been an abnormal rise of values in the interval. Neither is there any evidence to that effect. The only alternative is that applicants when they bought made an unusually good bargain and it is said that this was so, because they bought from a widow, but in the absence of more evidence on the point I cannot assume as a general rule that sales from widows are usually at a ruinous rate for the widow.

It has also been urged that the site is free from all drawbacks and desirable for residences, and there is some evidence on the point, but though a site next door to a distillery may be free from serious disadvantages, it can, I think, never be much sought after for building purposes especially when it is well away from a residential quarter. I do not think this site can possibly be a first class one for building purposes. When a plot to be acquired has changed hands shortly before the aquisition it is evident that the price then paid is a very good index [illegible] value in the absence of special circumstance[illegible] [illegible]ich do not [illegible] in this case. The award is at a rate do[illegible] the [illegible] [illegible]elves paid a

few months before the acquisition and cannot therefore I think be below the real market value. The award appears to me to be a fair and proper one. I confirm the lower courts order and dismiss this appeal with cost.

CIVIL SECOND APPEAL NO. 11 OF 1925.

BEFORE MR. S. J. MURPHY, I.C.S.

Jhunta Lal son of Sheoji Ram and 2. Kalyan Mal son of Jhunta Lal Decree-holders ... ... *Appellants.*

Versus.

Sua Lal son of Fouj Mal Mahajan Oswal of Nayanagar. Judgment debtor ... ... *Respondent.*

(*a*) When a decree is made payable by instalments and the whole decretal amount is made payable in a lump on default, the creditor, on default having occured, has no option either to recover his whole amonnt or to waive this right and to go on receiving regular instalments. He must execute the decree for the whole amount due.

(*b*) Limitation for the whole sum recoverable runs from the date of default.

	Lakshmi Narain	...	... *for Appellant.*
13-11-28.	Sobhag Lal Rawat	... ...	*for Respondent.*

ORDER.

This appeal arises out of execution proceedings on an instalment decree. The Executing court held that the application was in time and ordered execution to proceed. The first appeal court reversed this order and dismissed the application as time barred.

The only point is :—Is the application in question within time. I find that it is not.

Reasons. The decree was based on a compromise and was for Rs. 853-3-6 and so far as now relevant provided that repayment should be by monthly instalments of Rs. 10. It contained a clause that if default were made in the payment of 6 consecutive instalments then the whole amount then due would be recoverable at once. Payments were never regular. The dates are given in the lower court's judgment in full. All payments ceased after 1-9-22.

It appears that from the 17th June 1919 till the 4th March 1920 no payments whatever were made. There was therefore clearly a failure of 6 instalments and the whole amount had become recoverable in January 1920. There appears again to have been a default in 1921.

The contentions raised in appeal are that the creditor had an option when six consecutive instalments fell into arrear either to recover his whole amount or to waive this right and to go on receiving regular instalments. But I agree with the learned Additional District Judge in thinking this was not so. Such a condition could no doubt be inserted in a decree and if it is intended care should be taken to render it clear, but in the present case the language used is the ordinary form which gives no option but makes the whole amount remaining due recoverable at once.

On this view of the case the application is clearly time barred. The second argument for appellant is that by his acceptance of the payments subsequent to 17-6-19 *i.e.* those made on 4-3-20 and on later dates he waived the breach and received them as regular and punctual payments. This view has also been considered by the First Appellate court and the conditions on which waiver comes into operation have been stated by it. I agree that they have not been fulfilled in this case and that the execution application in question is time barred.

I confirm the lower courts order and dismiss this appeal with costs.

CRIMINAL REVISION NO. 2 OF 1926.

BEFORE MR. S. J. MURPHY, I.C.S.

Hira Lal son of Rai Sahib Bhajan Lal Mahajan of Ajmer ... ... Accused.—*Applicant.*

Versus.

Crown ... ... *Opposite Party.*

(*a*) The word 'makes' in S. 464 I.P.C. must be taken to mean 'manufactures' or 'prepares' or 'produces,' its ordinary meaning. It is not used in the English Conveyances sense 'of this indeture made' and does not necessarily connote an execution or signature of a document.

(*b*) The essence of the offence of forgery is that the document should be false and that it should purport to have been prepared or executed by some person by whom it has not so have been prepared or executed. A false signature is not a necessary requirement.

(*c*) Invoices are not necessarily documents which require to be executed or signed.

Ram Kishore and Ghisoo Lal ... ... *for Appellant.*
Abdul Wahid Khan ... ... *for Crown.*

ORDER,

The applicant in this matter has been convicted of an offence under section 468 I. P. C. on a charge with two heads, and has been sentenced to 4 months rigorous imprisonment in default of the payment of fine-Applicant's appeal was dismissed by the Additional Sessions Judge.

The facts are very simple. Applicant is a dealer in cycles and accessories, and from time to time obtains supplies from a firm at Agra. These goods arrive by train and are liable to be assessed for Octroi; the usual mode of assessment being on the invoice from the forwarding firm.

The first act charged against him is that on the 27th January 1923, he in place of an invoice showing goods to the value of Rs. 250-2-0 which he had received from the Agra firm prepared a forged one for Rs. 93-10-0 liable for octroi to the value of Rs. 2-10-9 instead of Rs. 7-13-0. The forged document in this matter is Ex. P. 1. A.

The second act charged against him is that on the 19th April, 1923, he in place of an invoice for Rs. 78/- prepared a forged one for Rs. 30/ and so made himself liable to pay only Rs. 1-2-0 as octroi instead of Rs. 2-7-0. The forged invoice in this case is Ex. P. 2. A.

There appears to be very little doubt about the facts, on which there are concurrent findings of the Courts below. The genuine invoices in the two cases have been produced and one admittedly made out by the Agra Firm. Ex. P. 1. is the invoice for goods sent by R. R. No: 90899 and ex. P. 1 (a) also purports to be for this consignment, and was the one presented for octroi purposes. Both are made out on the paper of the Agra firm, though not on the same form, and applicant has admitted that he made out the second alleged forged invoice. It was presented for assessment of octroi probably by one of his servants. The facts are similar in respect of Ex. P. 2. (a)., Applicant's learned counsel has not dwelt at any length on the merits and has confined himself chiefly to the ground that the main essestials of an offence falling within section 463, 465 and 468 I. P. C., have not been made out, that is, that the making of these false invoices does not amount to the making of a forged document and for this purpose relies chiefly on the remarks in the rulings reported in I. L. R., 7 Calcutta P. 352 and 77 Indian cases P. 225. The latter is I think not relevant, and the former case really turned on the question of an incomplete forger, and the remarks therein contained must be taken to have referred to those *circumstances*. Counsel's contention briefly is, that the word 'makes' in section 463 and 464 is used in the English conveyances sense of " this

indenture made" and necessarily connotes an execution, or signature of a document and that since these invoices do not purport to be signed by the Agra firm, they are not forged documents.

But I cannot think that this is the real meaning of the sections. If it were the real meaning of the 'makes', the following words in section 461 are surplusage, or vice-versa; and 'makes' in this section must be taken to mean 'manufactures', or 'prepares', or 'produces', its ordinary meaning. The essence of the offence is that the document should be false and that it should purport to have been prepared or executed by some person by whom it has not so have been prepared or executed, and that it should have been got up with the intent described in 463. I cannot read in the sections any requirement that there must be a false signature and in fact to do so would make the first part of section 464 inconsistent with the second part.

Invoices are not necessarily documents which require to be executed or signed, and the admittedly genuine ones on this record are not signed.

I think all the ingredients of the offence were present in this case. Applicant was in possession of the genuine invoices and yet prepared invoices purporting to be those of the Agra firm, made out on paper with the Agra firm's printed heading, and referring to the same Railway Receipts as did the genuine ones, but for a smaller amount of goods and a less value, whose only purpose could have been a smaller payment of amount of octroi duty: which is cheating, and an offence under section 468.

The only explanation put forward by the applicant was that the alleged forged documents were not invoices, but were memoranda to be shown to prospective customers for goods from his shop, but I am unable to understand this explanation, for evident ly they were not necessary for this purpose and it does not explain their use, or the differences from the originals of which these otherwise were copies, or why they should have been made out o

the Agra firm's paper. It is true that it has not been proved that applicant himself used the forged invoices but the intent is clear from their contents and the fact that they were used.

I think the convictions are correct. The learned Magistrate however has not made it clear that the two sentences he has inflicted are to run concurrently, though this appears to be his intention. I have been asked to reduce punishment but considering that the facts reveal a systematic fraud, I do not think I should be justified in doing so, but I direct that the sentences of punishment in this case should be concurrent. They have already been made concurrent with those passed in the companion case.

Otherwise I confirm the lower courts orders and dismiss this application.

CIVIL REVISION NO. 5 OF 1926.

BEFORE MR. W. T. W. BAKER, I.C.S.

Mukna son of Cuga ... ... *Applicant.*

Versus.

Banna son of Roopa ... ... *Opposite Party.*

(a) When execution of a Khata Bahi Baki is admitted or proved the burden of proof of non-receipt of consideration lies on the defendant under S. 101 and 102 of the Indiad Evidence Act A. I. R. 1925 Cal. 471 F. B. and 37 All. 71 foll.

(b) An acknowledgment can form the basis of a suit. 33 Cal. 1407 P. C. and 46 Bombay 24 relied upon.

Jasoda Nandan ... ... *for Appellant.*
Daya Shanker ... ... *for Respondent.*

The plaintiff sued to recover 200/-on a Khata Baqui from defendant.

The defendant denied execution. The judge of the Court of small cause Bewar held that execution was proved, but dismissed the suit as there was no evidence of payment of consideration. Plaintiff applies in revision to have the decree set aside.

The lower Court has made a mistake, as the execution of the Khata baqui having been proved the burden of proof of non receipt of consideration lay on the defendant, under sections 101, 102, Evidence Act Cf also Ram chand versus Chham Mal A. I. R. 1925 Calcutta 171 F. B. and Mahabir Pershad versus Bishen Dayal I. L. R. 27 Allahabad 71. The burden of proof was therefore on Defendant to show non-receipts of consideration and he adduced no evidence. It was contended for defendant that an acknowledgment cannot form the basis of a suit but this is a point not taken in the lower court and is further settled by the rulings of the Privy Council in Namrim Seth *Versus* Seth Rupchand I. L. R. XXXIII. Calcutta 1407 followed in Chunnilal *versus* Lachman Govind I. L. R. XLVI Bombay page 224. The plaintiff is therefore entitled to a decree.

With regard to interest there is no rate fixed in the acknowledgment. Interest has been calculated at the rate of 37½ per cent which is admittedly too high, interest will be reduced to 12 percent.

I set aside the decree of the Lower Court and direct that plaintiff do receive Rs 113/- and interest thereon as 12 per cent from 9. 6. 22 to date of suit 8/12/24 and further interest on the principal sum at 6. P. C. on the total of suit to date of decree and interest at 6 P. C. on the total amount from date of decree to date of payment with proportionate costs in the Lower Court and costs of this application.

Note:—It has been brought to my notice.........that the plaint though dated 8/12/24 was not filled in Court till 15th June 25 so the decree will have to be modified as the date of suit in the order is wrong.

CIVIL REVISION PETITION NO. 8 OF 1926.

BEFORE MR. W. T. W. BAKER, I.C.S.

Jugraj son of Nathmal Mahajan of Nayanagar.
Plaintiff—Appellant—*Applicant.*

Versus

Mayaram son of Sheoji Ram Ganchi of Sojat Marwar at present residing at Someshar Station,
Defendant—Respondent—*Opposite Party.*

(*a*) A rejection of a document which has been admitted in evidence for want of a stamp in violation of S. 36 of the Stamp Act is a ground for *revision. 18 Bom. 737 foll. 3 C.W.N. 581 dissented from.*

(*b*) Where a Court has applied its mind to the law and decides wrongly there is no revision but when it disregards some provisions of law and has not applied its mind to that provision a revision lies. 82 I.C. 658 relied on.

Raghu Nath ... ... *for Appellant.*
Chand Karan Sarda ... ... *for Respondent.*

ORDER.

This is an application for revision of the judgment of the Additional District Judge Ajmer on the ground that he has exercised his jurisdiction wrongly by rejecting the acknowl edgment Ex. 36 on the ground that it was inadmissible in evidence for want of stamp, which is against the provisions of section 36 of the Stamp Act.

It is further contended that the Lower Courts have ignored Ex. DI which amounts to an admission by the defendant of his debt due to plaintiff.

I will deal with the 2nd point.

When defendant was gi e he refreshed his memory by referring to a n

The opposite Party therefore claimed to see it and it was put on record.

It is contended on behalf of defendant that this is merely a copy of plaintiff's account taken by him in Court, but it differs by a few annas (9 annas 3 pies) further plaintiffs accounts on the debit side and the credit items are not the same. Hence it is argued it is a copy of the Defendants accounts, which he admittedly keeps, and is an admission by defendant—It has not been considered by the Courts below. The evidentary value of the document is a matter of inference and I do not think that inter ference in revision would be justifiable on the ground that the courts below had failed to consider this evidence and which they must be regarded as having discarded as of no value.

2 As regards the acknowledgment which was produced with the plaint it was admitted by the defendant. No objection was raised by the Defendant as to its admissibility and it was *only when the Court was writing its judgment that it held that* the document was inadmissible a view which was confirmed by the Court of appeal. I am referred to the case of Enahualal versus Balu Ram 3 Cal W. N. 581 in which however the Judges disagreed. Maclean C. J. holding that revision would not lie under section 115 C. P. C. the rejection of the document being only an error of law, while Bennerji J. was of the contrary opinion. The case does not seem to have been referred to a third judge and I assume the opinion of the learned C. Judge prevailed. However in view of the opinion expressed by the learned author (Pratt and Mulla J. J.) of the commentary on the stamp Act and the view taken by the Bombay High Court in Shiddapa versus Irva I-L-R. 18 Bom 737 I agree that the rejection of a document which has been admitted in evidence for want of a stamp in violation of section 36 of the stamp Act is a ground for revision.

The reported cases in which the first court admitted the document and basedits decision on it, and the appellate court

rejected it for want of stamp, contrary to the provisions of section 36 of the stamp Act are Nil. In the present case the first court also rejected it and the question is whether the document can be said to have been admitted in evidence.

No objection was taken by Defendant to the admissibilty of the Khata for want of stamp, his case being that it was signed without the accounts being explained, to him. There was therefore no issue on the point and the question of its admissibility does not seem to have arisen until the judge wrote the judgment.

The only case bearing on this question of what constitutes admission into evidence is, Chunnilal Versus Mulka Bhai 12. Bombay I. L. R. 466 where the admissibility of the instrument was objected to when tendered and the court postponed its decision till the delivery of the judgment on the whole case and the instrument was in the meantime exhibited by inadvertence. This does not apply here and there is nothing on the record to show that the document was not exhibited in the ordinary way. No reference to section 36 of the Stamp Act was made in either of the Courts below and that section definitely prohibits the calling into question of an instrument once admitted into evidence.

On considering the facts of this case I am of opinion that the instrument in question must be considered to have been admitted in evidence and then discarded in violation of section 36 of the stamp Act, a section to which neither of the courts below has applied its mind.

It was held in Rasa V Kathara 82 I. C 658 (Rangoon) that where a court has applied its mind to the law and decides wrongly there is no ground for revision, but when it disregards some provisions of law and has not applied its mind to that provision there is ground for revision.

In these circumstances the exclusion of the instrument was illegal and the decision of the Lower Appellate Court must be set aside and the suit remanded to the first court for determination

on the merits, as it has left the other issues undecided. The opponent will bear the costs of this application and the costs of the appeal in the Lower Appellate Court.

The costs in the original court will follow the final result of the suit.

REVISION PETITION NO. 10 OF 1926.

Gulraj son of Nathmal Guardian of Moti Lal Dalal, Naya Bazar, Ajmer ... ... *Applicant.*

Versus

Firm Sohan Lal Ganesh Narain through Sohan Lal proprietor of the firm and Ganesh Narain son of Ajey Pal, Mahajans, Naya Bazar Ajmer ... ... *Opposite Party.*

(*a*) A minor can be an agent under S. 184 of the Contract Act and can bind his principal in transactions with third parties. But the principal cannot sue the minor agent for damage caused by his default and rights and liabilities being co-extensive the minor agent cannot sue his principal for the commission.

B. D. Khanna ... ... *for Appellant.*

M. L. Capoor ... ... *for Respondent.*

ORDER.

The plaintiff is a minor and sued the Defendants for his commission alleging that he had been employed by Defdts. as a broker. Defdts. replied that the plaintiff being a minor could not legally enter into any contract and so they were not liable. The Judge Small Cause Court Ajmer took this view and dismissed the suit.

Plaintiff applies in Revision. It is contended that under Sec. 184 of the Contract Act a minor can be an Agent, as was held

in the case of Firm of Gopi Mal Durga Dass *vs.* The Bank of India XLV I. C. p. 17, and that though no duties can be enforced against the minor that does not affect the question of his rights. He can sue, though he can not be sued. On behalf of opponents it. is contended that duties and rights are reciprocal and if the minor cannot be sued, he cannot sue either. It is settled law that a minor is incompetent to contract Cf. Mohri Bibee *vs.* Dharmodas Ghose–I.L R.XXX Cal 539 P. C. Any contract made by the minor with the defendants is therefore void and he can not sue on it.

The case in 45 I. C. p. 17 is on a different point. Madan Gopal *vs.* The Hindu Biscuit Co–4 Bom Law Reporter 627 is also distinguishable as in that case the contract was made by a father on behalf of his minor sons.

Now under Sec. 184 of the Contract Act a Minor can be an agent and can bind his principal in transactions with third parties. The reason for this is that as between the Principal and third persons the act of the agent is looked upon as the act of the Principal who authorised it. Hence the rule that a person who has no *capacity to contract on his own behalf is competent to contract* so as to bind his principal. But this only applies to contracts between the minor agent and third parties and not to the contract between the minor agent and his principal. The Section itself says that no person who is not of the age of majority can become an agent so as to be responsible to his principal according to the provisions in that behalf contained in the Act i. e. Sec 211 Contract Act.

So the principal cannot sue the minor agent for damages caused by his default and this being so the minor Agent cannot sue the principal, as rights and liabilities are co-extensive. I am therefore of opinion that the view of the Judge Small Cause Court is correct and that the minor cannot sue. The application is dismissed with costs.

CIVIL REVISION APPLICATION NO. 18 OF 1926.

BEFORE MR. W. T. W. BAKER, I.C.S.,

Soloman son of Girdharilal Christian Nayanagar for self and as legal representative of his father Girdhari Lal deceased Appellant—*Appellant.*

Versus.

Balu son of Isar Kumbhar Chunpaz, Nayanagar Defendant, 2. Musammat Dhanni Alias Hansabai daughter of Ganga Ram and widow of B. Chotey Lal Chamar Nayanagar Plaintiffs—*Opposite Party.*

(*a*) The construction of a document is a question of law but does not involve a question of jurisdiction and no revision lies.

(*b*) The extraordinary powers under S. 115 C.P.C. will not be exercised if there is another remedy open to the applicant.

Mithan Lal ... ... *for Applicant.*
Ghisoo Lal ... ... *for Respondent.*

ORDER.

This and Revision Application No. 168/25 are companion applications arising out of two companion suits and appeals and may be disposed of in one judgment.

It will be necessary to set out the facts in full in order to decide the question whether the applications for revision will lie.

A Textile Mill was to be started at Bewar in 1918 and the building contract was taken by one Girdharilal Damodar. Balu defendant in this case and Nanu defendant in the other case were subcontractors for the supply of bricks and building materi-

als and advances were made to them by the contractor on that account, exceeding the amount of materials supplied.

Subsequently Girdharilal D. gave up the contract and left Beawar and when leaving he made up the accounts of the sub-contractors Nanu and Balu on 18-8-18, 1474/- being due by Balu and 584/- by Nanu.

Of these amounts 576/- on account of Nanu and 1414/- on behalf of Balu were paid by the Applicant Soloman and his father who is also named Girdharilal to the contractor Girdharilal D.

The contention of the Applicant is that these sums were merely a loan to Nanu and Balu.

Subsequently Soloman assigned his claims against Nanu and Balu to the Plaintiff Musammat Dhanni for consideration and she brought 2 suits againsts Balu and Nanu impleading Soloman as a defendant in both suits.

The suits were based on the allegation that the amounts represented above were loans by Soloman and his father to Nanu and Balu, but both the courts below held that this is not so, the relations between the assignee Soloman and Nanu and Balu were not that of debtor and creditor but of contractor and sub-contractor. The advances being in respect of materials to be supplied.

The suit against them therefore was not maintainable in the form in which it was brought, as it involved the construction of a contract, which was not before the court, and the taking of accounts. The suits against Nanu and Balu were therefore dismissed but decrees were passed against the assignor Soloman (his father being dead) as he had admittedly received the consideration of the assignment from the plaintiff.

Soloman appealed against both decrees but they were confirmed on appeal by the Additional District Judge, Ajmer-Merwara.

Under the Ajmer Courts regulation of 1877 the appellate decree is final as it confirms the decree of the first court on a question of fact. The present applications for revision are based on the ground that the courts below have erred in the construction of the documents Ex. D/1 and D/2 evidencing the settlement between the parties and that they were wrong in admitting the evidence of the contractor Girdharilal Damodar to vary the terms of the documents, under section 92 Evidence Act.

The Applications have been argued much as if they were second appeals.

It has, of course, frequently been held that the construction of documents is a question of law, justifying a second appeal, but not, so far as I am aware, that it involves a question of jurisdiction. The Courts had full juris diction to construe these documents and if they construed them wrongly (which does not appear to be the case) that would be an error of law, justifying the interference of the High Court in second appeal, but not in its extraordinary jurisdiction under section 115 Civil Procedure Code. This is not a second Appeal and I cannot interfere with the findings of the courts below.

With regard to the alleged transgression of section 92 Evidence Act that might be an error of law, but this also would not be a ground for interference in revision and in the present case section 92 provision 6 seems to apply, which makes oral evidence admissible to show in what way the language of a document is related to existing facts. There is a reference in Ex. D/1 and D/2 to a contract, and the retiring contractor Girdharilal Damodar has been examined and states that Soloman and his father stepped into his shoes and took over the sub-contracts of Balu and Nanu paying him the balance due on account of advances made by him to those persons.

In these circumstances I do not think that any question of jurisdiction arises in whatever way the case is looked at.

If the finding of the courts below is taken to be a finding of fact, it is one within their jurisdiction and not liable to revision.

It is a concurrent finding on a point of law and no second appeal lies, but under section 17 of the Ajmer-Courts Regulations the party dissatisfied might apply to the High Court at Allahabad. This again would be a bar to the exercise of the revisional powers of this court, as the extraordinary powers under section 115 Civil Procedue Code will not be exercised where there is another remedy open to the Applicant. I do not however wish to be understood as holding that an application for reference would lie, a point which has not been raised in arguments.

In any case the courts below were within their jurisdiction in deciding whether the suits as framed would lie or not, and there is no power to interfere with the finding in revision.

The question between the defendants (Soloman and the sub-contractors Nanu and Balu) would not be gone into in these cases.

I dismiss both the applications with costs.

CIVIL REVISION APPLICATION NO. 37 OF 1926.

BEFORE MR. W. T. W. BAKER, I.C.S.

Kan Mal son of Jai Lal Saraogi of Ajmer.
Defendant—*Applicant.*

Versus.

Raj Mal and Baj Mal, Saraogis Godhas of Ajmer.
Plaintiffs—*Opposite Party.*

(a) A suit for recovering money awarded by an Arbitrator is cognisable by Small Cause Court. The fact that defendant impeaches

the award as being invalid does not oust such jurisdiction or preclude it from adjudicating on the validity of the award. 42 All. 169 & 45 Bom. 318 (321) relied.

Raghu Nath ... ... *for Applicant.*
Kaushal Das ... ... *for Respondent.*

ORDER.

The facts of this case briefly are that the Applicant Kanmal was a Co-sharer in a Nohra. He mortgaged his share to one Chouth Mal and there was litigation between Chouth Mal and Kan Mal and his Co-sharer in which Chouth Mal obtained several decrees against them. Subsequently Kan Mal redeemed the share mortgaged and thereafter he and his co-sharer referred the dispute between them to arbitration. The arbitrators by their award partitioned the Nohra among the co-sharers, directing certain money payments to be made by one party to the other and ordering that Kan Mal should pay the amount of the decrees obtained by the mortgagee Chouth Mal in Appeals No. 14, 17 and 18 of 1923 in the Court of the Additional District Judge, Ajmer.

The present suit is brought by the other co-sharers against Kan Mal to recover the amount of the decree in appeal No. 17 of 1923. The Judge of the Court of Small Causes awarded the claim.

Kan Mal makes this application in revision to have the decree set aside.

Although the case has been argued at some length the matter is quite simple.

Three points arise

1. Whether the Small Cause Court had jurisdiction?
2. Whether the Arbitrators had authority to decide that Kan Mal should pay the amount of the decree in appeal No. 17 of 1923?

3. What is the amount payable by Kan Mal under that decree.

1. As regards jurisdiction the suit is clearly one to recover money awarded by an Arbitrator and as such cognizable by the Small Cause Court.

The fact that the defendant impeaches the award as being invalid does not oust the jurisdiction of that Court or preclude it from adjudicating on the validity of the award, Cf. Mizaji Lal *versus* Patal Kumar I.L.R. 42 All., 169, and Erach Shaw *versus* Dinvai I.L.R. 45 Bombay 318 (321).

The arguments regarding sections 69 and 70 of the contract act are beside the point.

I hold therefore that the Small Cause Court had jurisdiction.

2. The agreement of reference to arbitration says the parties refer their dispute regarding the Nohra to arbitration. It is contended that this does not contain any reference to decrees, and that the Arbitrator had no authority to decide who should pay the decretal amounts.

The portion of the Nohra, which contains *pukka* buildings on one side and not on the other involved the payment of sums of money by one party to the other in order to equalise matters.

Hence presumably the award regarding the payment of the decretal amounts, which may be regarded as a question in dispute connected with the Nohra. But it is clear that it was so regarded as all parties signed the award in token of acceptance and it is now too late to contest the authority of the Arbitrators to decide the question.

3. The suit out of which Appeal No. 17 of 1923 arose was one by Chbuth Mal for sale.

He claimed Rs. 140 the Lower Court awarded Rs. 72 on appeal the full amount claimed was decreed. It is contended that Kan Mal is only liable to pay Rs. 68 the difference awarded by the Appellate Court.

Where there is an appellate decree the decree of the Lower Court merges in the appellate decree which is the only one to be executed. I have called for the decree as only the judgment is on record. The decree is for Rs. 140 with Rs. 23-8-3 costs. The amount payable under the decree is therefore Rs. 163-8-3. The decree holder took out execution for Rs. 160-9-9. The total amount recovered from the plaintiff was Rs. 176-3-9.

Kan Mal is bound under the award to pay this amount to plaintiff.

The order of the Small Cause Court is affirmed and the application dismissed with costs.

MISC. REVISIONAL APPLICATION NO. 39 OF 1926.

BEFORE MR. W. T. W. BAKER, I.C.S.,

Kan Mal son of Jai Lal, Saraogi of Ajmer—*Plaintiff.*
Respondent Appellant—*Present Petitioner.*

Versus.

Lakhmi Chand, son of Phul Chand Saraogi of Deranthu—*Original.*
Defendant Appellant Respondent—*Opposite Party.*

(*a*) A suit for damages for refusing to allow plaintiff to irrigate his land from a certain well is cognisable by Small Causes Denial of plaintiff's title by defendant would not affect the Jurisdiction. Jurisdiction depends on the frame of the suit & not on the defence set up. 26 I. C. 128 & 32 Bom. 356 relied.

(*b*) If a Small Cause suit is tried as a regular suit even then S. 102 of the C.P.C. applies & no second appeal lies.

Mithan Lal ... ... *for Applicant.*
Daya Shanker . ... *for Respondent.*

ORDER.

The Additional District Judge was of opinion that the suit being of the nature cognizable by a Court of Small Causes and of the value of under Rs. 500 no second appeal lay under section 102 Civil Procedure Code. I have recently held in Civil review Application No. 26 of 1926 decided on 2nd August 1926, that section 15 of the Ajmer Courts Regulation is governed by section 102 of the Civil Procedure Code, so the only question arising in the application is whether the original suit is a Small Cause Court suit, though it was tried as a regular suit.

The suit was for damages from defendant for refusing to allow plaintiff to irrigate his land from a certain well.

This is a suit cognizable by a Court of Small Causes. The fact that defendant denied plaintiff's title would not affect the jurisdiction.

The cases quoted by the learned Advocate for applicants *viz.*

Antone *Versus* Mahadeo.

I.L.R. 25 Bombay page, 85, Savarimuthu *versus* Aithurusu I.L.R. 25 Madras 103 are cases of mesne profits and do not apply. Whether or not the suit is triable by a Court of Small Causes depends on the frame of the suit itself and not on the defence set up Cf., Lala Ram *versus* Miru Singh XXVI Indian Cases page 128 and Laxman Dass *versus* Asua I.L.R. XXXII Bombay 356.

The suit being for damages was therefore cognizable by the Small Cause Court, and the fact that it was tried as regular suit does not make any difference.

No second appeal lay under section 102 Civil Procedure Code. The order of the Lower Appellate Court is therefore correct and the application is dismissed with costs.

MISC. CIVIL REVISION NO. 48 OF 1926

BEFORE. MR. W. T. W. BAKER. I. C. S.

Firm Lalchand Badrinarain, through Badri Narain Behari Lal, Kedarnath Gopi Lal sons of Lal chand, Mahajans of Beawar,

Defendants—*Appellant—Applicants.*

Versus.

Firm Hiralal Jagan Nath Beawar, through Lala Kanhayalal son of Nathmal, Managing Proprietor, of Beawar, Plaintiff

Respondent—*Opposite Party.*

(a) In herent Jurisdiction under S. 151 C.P.C. is exercisable subject to the rule that if the Code contains any specific provisions which would meet necessities of the case in question the inherent jurisdiction should not be invoked. 44 Cal. 929 (936), 937) relied.

(b) The discovery of a new authority is no ground for a Review.

(c) An order which cannot be reviewed on the ground of wrong exposition of law cannot also be reviewed under S. 151 C.P.C. A Court cannot alter its order under S. 151 because it subsequently changes its mind.

(d) A court can amend its order after it has been drawn up and signed only in two cases.

(1) When the decree or order does not correctly state what the court actually decided or intended. This is done under its inherent power.

(2) When there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission. This is done under S. 152 C. P. C.

(e) Where a suit has gone up in appeal any compromise or adjustment of it under O. 23 R. 3 C. P. C. can be enquired into by the appellate court alone and not by the trial court. 21. I. C. 639 distinguished 9 Mad. 103 relied.

Raghu Nath ... ... *for Applicant.*
Mithan Lal & Sobhag Lal Rawat ... *for Respondent.*

This case has been argued at length but the facts in it are within a narrow compass. The essential facts are that the Plaintiff obtained a decree against the Defendant (Applicant) in the Court of the Sub Judge of Beawar. The Defendant appealed and got a stay of execution. While the appeal was pending the defendant applied to the Appellate Court stating that since the filing of the appeal the plaintiffs' claim under the decree and another claim which forms the subject of another suit had been compromised and that the compromise should be recorded under order 23 rule 3 read with section 107 Civil Procedure Code.

On the day of hearing the plaintiff appeared and denied the compromise and the Additional District Judge referred the matter to the sub Judge for enquiry and report. The sub Judge took evidence as to the compromise and made a report. The Additional District Judge fixed a date for hearing objections to the report. On that day 14/9/25 he held that the agreement must be proved to his satisfaction and set aside his order of reference to the Sub Judge, but by another order of 21/9/1925 he deferred dealing with question of compromise till he had disposed of the cognate appeal in the other suit between the same parties, as the subjudge had in that suit recorded a finding on the question of compromise.

The position therefore in September 1925 was that the Additional District Judge had made an order that the question of the proof of the compromise should be decided by himself.

On 7/3/26 the date fixed for hearing evidence regarding the compromise the Additional District Judge revised his former order and set it aside holding that the adjustment or satisfaction of the decree was a matter which should be adjudicated on by the original Court and declined to go into the question.

It is against this order that the present application for revision is preferred, on two grounds, first that the judge had no

jurisdiction to alter or review his own orders, and secondly that the order is wrong on the merits and amounts to failure to exercise a jurisdiction vested in him. The first point has been materially shortened by the admission of the learned Advocate for opponent that no application was made for review of the order of September 1925 and that the order now sought to be revised was passed under section 151 and 153 of the Civil Procedure Code.

As a matter of fact any application for review was long ago barred by limitation. It is therefore unnecessary for me to consider the decisions quoted by the learned pleader for applicants as to the question of review of judgment.

Section 153 Civil Procedure Code refer to amendments of proceedings in a suit, i. e. admissions, interrogations and the title and is clearly inapplicable.

There remains Section 151 Civil Procedure Code.

In this case the learned Additional District Judge has revised his own order and set it aside because he thinks it was wrong in law, apparently on the strength of a ruling in 21 I. C. 639 which was quoted at the hearing.

Now S. 151 C. P. C. affirms the court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. Cf. Ghan shyam Versus the Allahabad Bank Limited I. L. R. 44 Calcutta 929 at 936, 937.

In this case the plaintiff if he considered the order passed in September 1925 to be wrong could have applied for a review of it. He did not do so, and allowed that remedy to become time barred.

Hence the inherent jurisdiction of the Court could not be invoked.

Secondly the Court revised its own order because it thought the order was wrong on the strength of the ruling in 21 I.C. 639. It has been held that the discovery of a new authority is not sufficient ground for a review. I refer to my own cases because the case law is discussed in them.

I refer to Ramendra Vs. Govindra A. I. R. 1925 Nagpur P. 266 and Jagannath Shrinivas' 25 Nagpur P. 362. Both these cases follow Gurabani Kumarni Versus Suraj singh I. L. R III Patna, 134 which lays down that a judgment (or order) cannot be revised under order XLVII rule 1 on account of some *mistake or error apparent on the face of the record when the* alleged mistake or error is a wrong exposition of law. There would be no finality if a review can be sought on account of real or supposed errors of law, a process which might continue indefinitely. If then the Court could not have revised its own orders under order XLVII C. P. C. on the ground that the order was wrong in law, it could not review it of its own motion under S. 151 for the same reasons.

I am not aware of any case in which it has been held that a Court can alter its orders under section 151 because it subsequently changes its *mind*. There are various examples given under section 151 in Mulla's commentry on the C. P. C. but no such case as this.

There are only 2 cases in which a court can amend its order after it is drawn up and signed.

1. Under its inherent powers when the decree or order *does not* correctly state what the court actually decided or intended.

This is obviously not the case here as the court actually decided the point, but some months later changed its mind.

2. Under S. 152 where there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission.

This has no application here.

All the cases quoted by the learned Advocate for the appellant are cases where the order was passed in ignorance of the true circumstances. They are as follows. Mr. Kanapanth Shrinivas Rao Versus Kanapanth Verkatana Sawami A. I. R. 1926 Madras 119 the Court was mislead.

That is not the case here

In Maroti Sonar Versus Chintamani Sonar 1924, Nag, 58, the order was passed in ignorance of what was before the court. In Jodhasingh Versus Padey Gotha Dass 1925 All. 622 there was a mistake in dismissing the suit for default. In Syed Taffuzool Hussain Khan Versus Rughnath Pershad 14 M I. A p. 40 P. C. the order was inoperative.

In Debibakhsingh Versus Habib-Ullah I. L. R. 33 Allahabad 331 (25 M. L. J.) 148 P. C the plaintiff was dead and the case was dismissed for this supposed default.

In Lekhraj versus Shamlal I. L. R. XVI Bombay 404 the order was made in an improper form and was corrected.

I hold therefore that the Additional District Judge had no jurisdiction to review his own order on the ground that it was wrong in law. The same arguments may apply to his former order revising the original order sending the matter to the sub judge for determination, but we are not concerned with that, and neither party took objection to it. The order must be set aside on this ground.

2. On the merits also I think the order is wrong. The learned Additional Disrtrict Judge has relied on Vakkijal Panth Vactil Keru Nari V. Vakkijal Panth Vactil Meccaksh XXI I. C. 639 The facts of that case are not the same as the present.

That was an appeal against an appellate order passed in execution proceedings, which is not the case here. The order under revision was not passed in execution proceedings.

That case lays down that under S. 258 of the old C. P C. and also according to order 21 r. 2 of the present code a certificate of payment of adjustment should be filed in the court whose duty is to execute the decree, that is the Court that has passed the decree, and not the court to which an appeal has been preferred from the decree. It further lays down the filing of a compromise petition under Section 375 of the C. P. C 1882 (or 23 r. 3) cannot be treated as the filing of the *certificate of satisfaction* under S 258 (or 21 r. 2)

The compromise petition in the present case was filed under order 23 r. 3 and therefore the case quoted does not show that it should have been presented to the court executing the decree, but rather the reverse.

The appellate court alone had jurisdiction on the subject matter of the suit of which the appeal is a continuation. The alleged adjustment was subsequent to the appeal, and the word court in order 23 r. 3 must in my opinion refer to the Court before which the appeal was pending and to which the application was made. It would be a different matter if no appeal was pending and there was a final decree In that case the executing court alone would have jurisdiction to enquire into the compromise or adjustment.

Appasin Versus Mantha I. L. R IX Madras 103 is a somewhat similar case. There the compromise application was objected to by one of the parties and the evidence (affidavits) was considered by the Court of appeal in this case the High Court who being dissatisfied ordered the sub Judge to record further evidence and submit his opinion, but the decision on the compromise application was made by the high Court. I am of opinion that the compromise should be adjudicated on by the Appellate Court and that

he erred in refusing to exercise this jurisdiction.

I set arise the order of 8/3/26 and direct that the compromise application should be disposed of by the Additional District Judge.

The opponent will bear the Applicant's costs in revision.

CIVIL REVISION APPLICATION NO. 59 OF 1926.

BEFORE MR. K. W. BARLEE, I.C.S.

Mst. Nanhi Bibi wife of Zulfikar Ali of Ajmer—*Petitioner.*

Versus

Mahmad Ali, (2) Ahsan Ali, (3) Hafiz-ul-Rehman sons of Azam Ali of Ajmer ... ... *Opposite Party.*

(*a*) It is the duty of a judge to frame correct issues and if he does not do so his error amounts to an irregularity of procedure but no revision lies as it is an interlocuto.y order.

(*b*) No revision lies against interlocutory order 63 I. C. 15 (All.) F. B. foll.

(*c*) Since Ajmer-Merwara has till recently been subject to the Allahabad High Court the view adopted by that Court, where their is conflict of opinion, should be adopted here.

Prabhu Dayal ... ... *for Applicant.*
Puskar Narain ... ... *for Respondent.*

ORDER.

The applicant a Mohomedan woman filed a plaint in the Court of the Sub-Judge, First Class, Ajmer, against her brothers in which she pleaded that certain property was the undivided and

joint property of the parties and asked for an injunction to prevent the defendants building on it. The defence was that their father had before his death divided the property amongst his sons.

The Court framed an issue 'Is the property joint and undivided or was it divided and made over to the defendants by their father in 1915 or 1916 ?'

On 27th February 1923 an application was made to the Court to call on the defendants to commence their evidence because the onus of proof was on them. The learned Judge held that the onus of proving the second part of the issue was on them, and the onus of proving the first part on the plaintiff. He made the following entry in the proceedings 'The Vakil for the plaintiff does not want to produce any evidence on part 1 of issue 1...... and wishes to preserve his right to adduce rebutting evidence on the issues the burden of which lies on the defendants. (It will be for consideration later whether the plaintiff will have the right of adducing rebutting evidence with regard to part 11 of issue 1), Mr. Prabhu Dayal states that part 11 of issue 1 is opposite of part 1. Now the defendants evidence be called.

The defendants led their evidence and then the learned Judge refused to allow the plaintiff to bring evidence in rebuttal. Hence this application.

I am of opinion that the learned Judge was wrong. It has been argued that the plaintiff was bound to prove her title and that she should have commenced. But once it was admitted that the property had belonged to the father of the parties the natural presumption was that she was entitled to a share under Mohamedan Law, after his death, and it was for the defendants to prove the gift on which they relied. It was a positive fact especially within their knowledge and they should have been called on to prove it. A party should not be asked to prove a negative.

The question has been raised whether this interlocutory order

can be revised even if it be wrong. I am of opinion that the error amounted to a material irregularity in as much as the error was due to an irregularity of procedure. It is the duty of a Judge to frame correct issues, and if he does not do so his error amounts to an irregularity in procedure. Here the learned Judge so erred in as much as he framed as an issue 2 questions, one being the converse of the other and did not indicate clearly as he ought to have done where the onus lay. That mistake led to his calling on the wrong party to begin and eventually to his depriving that party of her right to lead evidence in her turn. It appears then, that the fundamental error was one of procedure.

But the important question is whether this Court has power to revise an interlocutory order, and whether the order in this case ought to be revised. The case law on this point is voluminous and can only be summarised . The High Courts of Allahabad and Lahore have decided in full bench cases that such orders cannot be revised. On the other hand the High Courts elsewhere are of a contrary opinion. The determination of the disputed point depends on the meaning of the word 'case' in Section 115; and, since this district has till recently been subject to the Allahabad High Court, it seems to me that the view adopted by that Court should be adopted here. I am ready to adopt this course that I agree entirely with the views expressed by Pigott Justice in the leading case of Buddhu Lal Versus Mewa Ram (full Bench 63 Indian Cases page 15 at page 16). The reasoning of the learned Judge seems to me to be conclusive.

It is, however unnecessary in this particular case to distinguish between the various authorities, in as much as it is not the practice of any Court to interfere where there is an effective remedy open to an aggrieved party by way of appeal and the present applicant will have that remedy available to her, and would have had it already had she not come to this Court. The decision of which she has complained was made at the last stage of the proceedings and the suit is now awaiting arguments

Judgment. For this reason I must dismiss the application, but in the circumstance make no order as to costs.

REVIEW APPLICATION NO. 16 OF 1926.

BEFORE MR. W. T. W. BAKER, I. C. S.

Gopi Nath son of Baldeo Brahman of Choti Basti Pushkar Appellant—*Applicant*.

Versus

The Brahmans of Badi Basti, Pushkar by Mahabir Prashad, Teju Lal son of Debi Bux and others of Pushkar Respondents—*Opposite party*.

It is not a sufficient reason for granting a Review that if another opportunity was given to the applicant he would satisfy the court that the previous order was wrong. 37 All, 440 relied upon.

Sobhag Lal Rawat.

This is an appliction for review of a judgment of my learned predecessor in a second appeal passed on 9/3/26. The grounds amount to saying that the judgment is wrong. This is no ground for a review. There is no error or mistake apparent on the face of the record nor is there any other sufficient reason for a review. This is really an appeal against my predecessor's judgment which of course does not lie.

It is not a sufficient reason for granting a review that if another opportunity was given to the applicant he would satisfy the court that the previous order was wrong. (Binda Pershad versus Raghbir Saran I. L. R 37 Allahabad 440).

The application is rejected.

CIVIL REVISION APPLICATION NO. 75 OF 1926.

BEFORE MR. K. W. BARLEE, I.C.S.

Ram Chander and Ganeshi Lal sons of Kishen Lal Mahajan Oswal of Beawar Original Plaintiff—*Applicnt.*

Versus.

Sheo Nath deceased by his legal representative Gokal son of Sheo Nath of Sarmalian, Tehsil Beawar

Original Plaintiff—*Opposite Party.*

(*a*) A Khata baki is a promise to pay and can form the basis of a suit. 33 Cal. 1407 P. C. and 46 Bom. 24 relied upon. 89 I. C. 402 distinguished.

Raghu Nath ... ... *Applicant.*

ORDER.

The Applicant sued the opponent as heir of his father, deceased to recover Rs. 500/- due on a *Khata Baki* which he alleged to have been executed by the deceased. The opponent pleaded ignorance of the transaction. The applicant called and examined a scribe who deposed that the old accouut had been made up in his presence and the presence of the debtor, that he had written the *Khata Baki* at the debtor's request, and that the debtor had put his thumb mark on it.

The learned Small Cause Court Judge held that execution had not been satisfactorily proved and that a suit on such a *Khata baki* was not maintainable. I find myself unable to accept the learned Judge's view as to the right to sue on this *Baki khata.* The document reads thus 'Balance struck and signed. Balance to be paid'. This amounts to an acknowledgment of liability and a promise to pay. An unconditional acknowledgment was a..

Judgment. For this reason I must dismiss the application, but in the circumstance make no order as to costs.

REVIEW APPLICATION NO. 16 OF 1926.

BEFORE MR. W. T. W. BAKER, I. C. S.

Gopi Nath son of Baldeo Brahman of Choti Basti Pushkar
Appellant—*Applicant.*

Versus

The Brahmans of Badi Basti, Pushkar by Mahabir Prashad, Teju Lal son of Debi Bux and others of Pushkar
Respondents—*Opposite party.*

It is not a sufficient reason for granting a Review that if another opportunity was given to the applicant he would satisfy the court that the previous order was wrong. 37 All. 440 relied upon.

Sobhag Lal Bawat.

This is an appliction for review of a judgment of my learned predecessor in a second appeal passed on 9/3/26. The grounds amount to saying that the judgment is wrong. This is no ground for a review. There is no error or mistake apparent on the face of the record nor is there any other sufficient reason for a review. This is really an appeal against my predecessor's judgment which of course does not lie.

It is not a sufficient reason for granting a review that if another opportunity was given to the applicant he would satisfy the court that the previous order was wrong. (Binda Pershad versus Raghbir Saran I. L. R 37 Allahabad 440).

The application is rejected.

CIVIL REVISION APPLICATION NO. 75 OF 1926.

BEFORE MR. K. W. BARLEE, I.C.S.

Ram Chander and Ganeshi Lal sons of Kishen Lal Mahajan Oswal of Beawar Original Plaintiff—*Applicnt.*

Versus.

Sheo Nath deceased by his legal representative Gokal son of Sheo Nath of Sarmalian, Tehsil Beawar

Original Plaintiff—*Opposite Party.*

(*a*) A Khata baki is a promise to pay and can form the basis of a suit. 33 Cal. 1407 P. C. and 46 Bom. 24 relied upon. 89 I. C. 402 distinguished.

Raghu Nath ... ... *Applicant.*

ORDER.

The Applicant sued the opponent as heir of his father, deceased to recover Rs. 500/- due on a *Khata Baki* which he alleged to have been executed by the deceased. The opponent pleaded ignorance of the transaction. The applicant called and examined a scribe who deposed that the old account had been made up in his presence and the presence of the debtor, that he had written the *Khata Baki* at the debtor's request, and that the debtor had put his thumb mark on it.

The learned Small Cause Court Judge held that execution had not been satisfactorily proved and that a suit on such a *Khata baki* was not maintainable. I find myself unable to accept the learned Judge's view as to the right to sue on this *Baki khata.* The document reads thus 'Balance struck and signed. Balance to be paid'. This amounts to an acknowledgment of liability and a promise to pay. An unconditional acknowledgment was always

been held to imply a promise to pay. Mani Ram Versus Rup Chand (I. L. R. 33 Calcutta 1407 Privy Council) and this document therefore, amounts to a promise to pay a debt. It can therefore, form the basis of a suit (Chunni Lal Versus Laxman I-L. R. 45 Bombay 24). This scarcely seems to need authority in view of the clear words of section 25 of the Indian contract Act, which validates a promise to pay a time barred debt when in writing and signed, and a *fortiori* a debt which is not barred by time. The case which has been quoted by the learned Judge Reoti Ram Versus Lachman 89 Indian cases 402 is no authority to the contrary, for clearly the acknowledgment there under consideration is called in the headnote 'a mere acknowledment' did not imply a promise to pay.

The other question is whether the learned Judge was justified in rejecting the sworn testimony of the plaintiffs witness where there was nothing on the other side. It is difficutlt to justify him. In any case I do not think that he was right in rejecting the evidence without examining the plaintiff's accounts, which ought to be examined. Under Order 41 Rule 27 I direct him to produce the accounts of his transactions with the deceased for examination in this court within three weeks.

The applicant has appeared and produced his old account Book and three bonds all of Jeth Sud 10-1971. I can find nothing wrong with the accounts and think that the clain must be allowed.

Decree for Rupees 543/-with interest from suit to payment at 6 percent, and costs thorough out.

MISCELLANEOUS CIVIL REVISION APPLICATION NO. 81 OF 1926.

BEFORE MR. K. W. BARLEE, I. C. S.

J. R. Daji and Company of Lahore.

Appellants—*Applicants.*

Versus.

Major G. R. Hughes stationed at Lucknow.

Respondent—*Opposite Party.*

(*a*) S. 75 of the Provincial Insolvency Act follows the wording of S. 115 of the C. P. C and an aggrieved party is entitled to file a Revision application under it to the High Court.

(*b*) An Insolvency court is not a court of ordinary civil jurisdiction and the provisions of the Code of Civil Procedure apply to it only in so far as they have been incorporated in act V of 1920.

(*c*) Before 1914 the pay of an officer of the Indian army who is a 'public servant' was exempt from attachment under S. 60 of the C. P. C. but after the amending act of 1914 a moiety of such pay is *now attachable*. 39 I. C. 92 (All.) and 43 Bom. 716 foll.

(*d*) The wording of S. 28 (2) of the Insolvency Act is *clear*. A moiety of a public servant's salary vests in the Receiver and *he has no* power to leave any of it in the insolvent's hands. 40 All. 213, 38 I. C. 410 and 21 I. C. 950 relied upon this point.

(*e*) Under S. 66 (2) of the insolvency act the Receiver is *empowered* to make an allowance to the insolvent for his maintenance out of the moiety of his pay attached by him (Receiver). 40 All. 213, *38 I. C. 410* and 21 I. C. 950 not foll on this point. S. 66 (2) is independent of S. 66 (1) of the Act.

Prabhu Dayal .. .. *for Applicant.*

Gauri Shanker Bar.-at-law ... ... *for Respondent.*

ORDER,

The history of this case is as follows:—

On the 24th March, 1911, the opponent Major Hughes made an application in the Court of the District Judge, Ajmer-Merwara, praying that he might be declared insolvent under the provisons of Act III of 1907. The case appears to have been transferred to the small cause Court Judge, who had jurisdiction in insolvency. The application was opposed by three creditors including the present applicant, but their objections were over ruled, and by an order dated 31/11/1911, the opponent was declared insolvent under the provisions of the Act. The Judge then proceeded to consider the amount which the opponent should be required to pay monthly out of his pay as a Captain in the Indian Army, and fixed it at Rs. 130. An appeal was preferred by one creditor, the present applicant and the Distirct Judge varied the order of the original court by fixing Rs. 200 as the amount to be paid monthly. The insolvent approached the High Court in revision but without success.

2. In 1925 the present applicant made an application in the Insolvency Court in which he stated that Major Hughes had been irregular in his monthly payments and prayed that half his pay should be attached at least till over due instalments are 'recovered and realized from him'. It was contended on behalf of Major Hughes that his future pay would not vest in the Receiver, that it was exempt from attachment, that the monthly payment which had been fixed by the High Court could not be varied and that the creditor who had accepted Rs. 200 per mensem were debarred from reopening the question. These objections were not accepted and the learned Judge made an order that a moiety of the salary should be attached for a period of two years.

Major Huges appealed to the Additional District Judge, and the applicant filed a cross appeal. It was decided that the order of the original Court was not legal since it varied the order made by the High Court in 1912.

The applicant has now approached this Court in appeal or revision under section 75 of the Insolvency Act (V of 1920) and the first point for decision is whether an appeal or a revision lies. It has been contended by learned Counsel that section 75 of the act gives a party no right to apply for revision, but merely allows the court *Sui moto* to call for a case from a lower Court. I find, however that section 75 follows the wording of section 115 of the Civil Procedure Code of 1908, and it is clear, therefore, that this Court is not precluded from dealing with an application made by an aggrieved party. It is the practice in all High Courts to accept applications for revision and they rarely act *Sui moto*. The objection to the entertaintment of an appeal is that the applicant did not approach the Court within the period of 60 days allowed by section 22 of the Ajmer Court's Regulation (I of 1877). But this is not a case which is governed by the Regulation, which deals only with Civil Courts of original jurisdiction and to courts which have appellate jurisdiction from the decisions of such courts and does not govern the procedure of the insolvency courts which were created for a different purpose, with different duties, and by a special act. A court of original Civil Jurisdiction is one which has jurisdiction under section 9 of the Civil Procedure Code to try suits of a Civil nature, whilst the functions of an insolvency Court are to protect debtors and administer estates. Civil Courts have been set up by various acts such as the regulation of 1877, whilst the Insolvency Court was created by Act III of 1907 and the procedure to be followed in insolvency matters is contained in the insolvency Act (Now V of 1920) and those parts of the Civil procedure code which have been incorporated in it. The period of limitation, therefore, in this case was 90 days as allowed by Section 75 of that act.

The principal questions which have to be decided are.

(1) Whether the pay of an officer of the Indian Army is liable to attachment by an Insolvency court.

(2) Whether, in view of the order of this court in 1912 Major Hughes can be required to pay more than Rs. 200 per month.

On the first question I agree with the learned Additional District Judge.

On the making of an adjudication the whole of the property of the insolvent vests in the court or the Receiver as the case may be (section 28—2) and in this is included all property which is acquired by the insolvent or devolves on him after the date of the adjudication (section 28—4). The word 'property' is interpreted by sub section (5) to mean all property with the exception of property exempted from attachment by the Code of Civil Procedure and a reference to secton 60 of that code shows that one moiety of the salary of a public officer was so exempt up to 1914, the law was different, as section 60 sub-section (2) contained a proviso to the effect that nothing in the section should affect the provisions of the Army Act, and protected the pay of an officer of the Indian Army from atrachment. But the proviso was omitted by an ammending ac: of 1914, and it has been held that in consequence of the omission the pay of an officer of the Indian Army can be attached. (Hay Versus Ram Chandra 39 Indians Cases, 92 a decision of the High Court of Allahabad in a case referred under section 18 of the Ajmer Court Regulation and Kering Rupchand versus Murray (43 Bombay 716). The protection given by section 136 of the Army Act only lasted until the legislature in India directed to the contrary, and a clear direction to the contrary has been given by the omission of this provision. Since that time an Army Officer, who comes within the definition of a 'public servant' given in Section 2 (17) of the Civil procedure Code, is entitled to the protection given by section 60 (I) of the code to all other public servants and to no more.

It follows that a moiety of the salary of an Army Officer is liable to attachment under a decree of a Civil Court and by virtue

of section 28 (5) that moiety vests in the Court, and can be realized by the Court by the use of the powers given it by section 5 of the Act, that is the powers exercised by it in the exercise of its civil jurisdiction which include the power of attaching the officer's salary (order 21 Rule 48). I am unable to accept the arguments that an Army officer's salary cannot be attached by an Insolvency Court even if it can be attached in execution of a decree of a civil court. Section 28 (2) when read with section 60 civil procedure Code embodies a direction of the Indian Legislature such as is contemplated by section 136 of the Army Act.

The second question is whether the order made by this court in 1912, restricts the Insolvency Judge from attaching more than Rs. 200/- of the opponents salary. That was the amount fixed by the District Judge in 1912, and confirmed by the High Court. The order for a monthly payment was originally made by the Judge of the Insolvency court. It was embodied in the order of adjudication, but was no part of it. The judge had jurisdiction to make it and made it because he had to decide what parts of the petitioner's assests, as they then were, were liable to vest in the Receiver. It was found that the only assests were some kit, and a monthly salary of Rs. 529/-/-. Had it not been for Section 16 (2) (a) of the Act read with section 60 of the Civil procedure Code all the available assets would have vested in the Receiver. But those sections necessitated an enquiry as to what part should be exempt, and the real meaning of the order was that only 329/- per month should be exempt. That order was probably wrong but I can not now change it. It is essential to note that the Judge was considering the assets available at the time. He could have considered assets likely to be available in the future, and he might have fixed a proportion of the salary as exempt. But he did not do so. He wrote 'the sum at present available is Rs. 130/- per month'. The District Judge and the High Court varied that sum, but neither Court considered anything but the assets then available.

This being so I can not understand how the question now before me can be said to be resjudicata or in what way the Insolvency Judge in 1926, interfered with the orders of 1912. The question which arose in 1926, was not one which was in fact considered or decided by any court in 1912. In the interval of 14 years Captain Hughes, as he then was, had become Major Hughes and had begun to draw an increased salary, and this increased salary, that is the excess of his present salary over Rs. 529/- can fairly be looked up on as property which has devolved on him since the date of the adjudication, and since the date of the order of the High Court which fixed the instalment to be paid out of the Rs. 529/-. The question now has arisen for the first time what part, if any, of the excess can be made available for his creditors and there can be no question of a bar of *resjudicata*. Shorn of legal technicalties the position is that in 1912 the Insolvency Judge and the District Judge made arrangements for the attachment of a monthly sum out of the then salary, and there is nothing in that order to prevent the Insolvency Court reconsidering what should be paid out of the present salary.

My decision, therefore, is that the excess pay now drawn each month by Major Huges is liable to attachment provided that not more than half his salary can be attached in any one month. Thus there can be no question of recovering arrears.

The next question is whether the Insolvency Court can direct that less than half the officer's salary should be attached. I have considered this with great care because it is possible that the effect of an order attaching a moiety may be to force Major Hughes to retire on pension, and if he does so the creditors will lose the only source of dividends. At first I was inclined to think this Court had an inherent jurisdiction to prevent such an abuse of its process but the wordings of section 28 (2) of the Act are clear. A moiety of the officer's salary vests in the Receiver and section 59 imposes on him the duty of realizing it. He has

no power at this stage to leave any of it in the insolvent's hands. Debi Prashad Versus Lewis I. L. R. 40, Allahabad 213, and Tulshi Ram Versus Girsham 38 Indian Cases 410, in which Ram Chandra Neugi Versus Sharma Charan Bose, 21 Indian cases 950, is quoted and approved. These cases are clear on the point but they go further and decide that the Receiver is not empowered by Section 66 (2) (old section 44 (2)) to make an allowance to the insolvent for his maintenance. The argument was that the Receiver had no such power in as much as maintenance has been fixed by statute, section 60 Civil Procedure Code, with deference I consider the argument to be unsound. Section 66 (2) of the Insolvency Act is clearly independent of section 66 (1) which is complete in itself and permit any terms to be offered to an insolvent who manages his own property. Sub Section (2) is, therefore, general and it permits the Receiver to give an allowance out of the property which has vested in him. The Act does not recognize any other. The presumption, is strong that he can give back to a public officer a part of the moiety of salary attached. The objection that he cannot do so because an allowance for maintenance has already been fixed by statute is, I submit, unsound. The Insolvency Act does not fix it. It is fixed by section 60 of the Civil Procedure Code for the purposes of that Code and that Section cannot be read into the Insolvency Act for all purposes but merely for the limited purpose of defining the term property for the purposes of this section that is section 28, 'property in this sentence is the only property over which the Receiver has any control and it is only from such property that he can make an allowance under section 66 (2). Further the decisions referred to would appear to place a Public Officer in a special class distinct from the other classes mentioned in section 60, which needs justification. If a Public officer can not be given an allowance under section 66 (2) because a moiety of his estate is exempt, it would seem to follow that a shopkeeper can not be given an allowance because his clothes and his wife's ornaments are exempt, and th

sub-section would become useless. The only reasonable course is to interpret the Insolvency Act strictly, as the creditors, insist in my doing when a strict interpretation favours them. I am, therefore, only concerned with property under the Act that is in this case a moiety of the Insolvent's salary, and I find that section 66 *(2)*. *Empowers the Receiver to make the insolvent an allowance* out of it, if he finds it necessary. He will of course in considering the necessity take into account the fact that Major Hughes still keeps half his salary and his allowances in addition, but that is a different matter.

For these reasons I reverse the judgment of the Lower appellate Court and direct the Receiver to recover a moiety of the salary each month. Major Hughes can apply to him if he wishes, and he will then make a careful enquiry as to the need for any further allowance. I cannot decide on that point at present and have touched on it merely because it was argued by learned counsel. As to costs the appellants are entitled to none as they did not ask leave to appeal. But as the respondent did not raise the point I allow them their costs, but direct that they be added to the scheduled debts.

CIVIL SECOND APPEAL NO. 4 OF 1926.

BEFORE MR. W. T. W. BAKER, I. C. S.,

Seth Gadh Mal son of Seth Sirah Mal Lodha of Ajmer.

Plaintiff, Respondent—Present

Versus.

Abdul Rahman son of Nabi Bux

Defend

(a) A Second appeal would lie with regard to costs where a question of principle is involved.

(b) Where a suit is not tried on merits but is dismissed for reasons beyond the control of the parties the ordinary rule is to make no order as to costs or to direct that each party should bear his own costs.

Mithan Lal ... ... *Appellant.*
Jasoda Nandan ... ... *Respondent.*

ORDER.

This is a second appeal on the question of costs only.

The facts are that the defendant purchased certain property from one Khairat Ali. The present plaintiff brought a suit to establish his right of pre-emption with regard to this property against the defendant and his vendor Khairat Ali, but meanwhile a relation of the vendor brought a suit against him and the vendor, and got a decree, declaring that the vendor had no right to sell the property. The sale thus fell through and consequently the pre-emption suit brought by the present plaintiff was dismissed, as no cause of action remained. The Sub Judge however holding that in the suit between the cosharer and the vendor it had been held that the sale was collusive, ordered Defendant to pay the plaintiff's costs. Defendant appealed and the Additional District Judge set aside the order and directed each party to bear his own costs.

Plaintiff makes this second appeal.

Although the appeal has been argued at some length there is not much in it.

I agree that a second appeal will lie with regard to costs where a question of principle is involved.

The ordinary rule is that costs should follow the result. The plaintiff's suit was dismissed—Ordinarily he would have to bear the costs—but the suit failed through causes beyond his control as the result of the other suit was to do away with his

cause of action and to render his suit unnecessary. The ordinary course in such cases where the suit is not tried on the merits, but is dismissed for reasons beyond the control of the parties is to direct that each party should bear his own costs which comes to the same thing.

The subjudge, however, relying on the judgement in the other suit, which was not inter parties, held that the defendant was to blame and saddled him with costs.

This in my opinion involves no question of principle and no appeal lay, and also no 2nd appeal. On the merits the Judgement on which the Sub-Judge relies was not inter parties and was relevant under section 13 evidence Act for the purpose of showing that the suit had been set aside as the defendant's vendor had no title..

The finding that the sale was collusive is based on the fact that the vendor was not the sole owner at the time of the sale.

It was held by the Bombay High Court in Lakshman Govind Versus Arrit Gopal I. L. R. 24 Bombay P. 591 that judgements not inter parties are admissible under section 13 of the Evidence Act to show that the partition deed set up by defendants had been fraudulent and void, but in that case the second suit had been fought out and the same deed set up as a defence, which is not the case here, and that case may be distinguished on that ground.

It is argued that the defendant was responsible for the litigation, as plaintiff was forced by the sale to bring the pre-emption suit.

The person really responsible was the defendant's vendor and if he had been ordered to pay the plaintiffs costs it would have been a proper order. He was however discharged from the suit. I am of opinion that the order of the Lower Appellate Court directing each party to bear its own costs is equitable and should not be disturbed.

The appeal is consequently dismissed.

CIVIL APPEAL NO. 5 OF 1926.

BEFORE MR. W. T. W. BAKER, I.C.S.

Seth Sobhag Mal Lodha minor son of Seth Abhey Mal Lodha of Ajmer through his next friend Sethani Dolatkanwar widow of Seth Abhey Mal—Original Defendant-Respondent—
Present Appellant.

Versus.

Kistur Chand son of Mundan Mal and Raj Mal son of Kistoor Chand Saraogi of Ajmer—Original Plaintiff-Appellant—
Present Respondent.

(*a*) A court must be taken to have done that which it could only do under the provisions of the law. A mention of a wrong provision in the order will not make that order under that provision. (Case law discussed).

(*b*) When a suit is unsustainable as brought the proper order to pass is to allow the plaintiff to withdraw the suit with leave to bring a fresh suit, and on failure to dismiss the suit. The plaint cannot be ordered to be amended and proceeded with in the same suit. 9 All. 191 P.C. foll.

(*c*) When a case is not dismissed on merits the order is not under O. 17 R. 3. (33 All 690 relied upon), but the order in such cases amounts to a decision on a preliminary point within the meaning of O. 41 R. 23 C. P. C and a second appeal lies It cannot be said to be an order under S. 151 C. P. C.

(*d*) The expression 'preliminary point' is not confined to such legal point only as may be pleaded in bar of a suit but comprehends all points or issues whether of fact or of law, the determination of which has precluded the necessity for determining other points or issues and such other points or issues have therefore been left undetermined. 9 All. 26 (32 note) 10 All. 289 and 16 Mad 207 foll.

Mithan Lal .. .. *Appellant.*

Ghisoo Lal ... . *Respondent.*

cause of action and to render his suit unnecessary. The ordinary course in such cases where the suit is not tried on the merits, but is dismissed for reasons beyond the control of the parties is to direct that each party should bear his own costs which comes to the same thing.

The subjudge, however, relying on the judgement in the other suit, which was not inter parties, held that the defendant was to blame and saddled him with costs.

This in my opinion involves no question of principle and no appeal lay, and also no 2nd appeal. On the merits the Judgement on which the Sub-Judge relies was not inter parties and was relevant under section 13 evidence Act for the purpose of showing that the suit had been set aside as the defendant's vendor had no title.

The finding that the sale was collusive is based on the fact that the vendor was not the sole owner at the time of the sale.

It was held by the Bombay High Court in Lakshman Govind Versus Arrit Gopal I. L. R. 24 Bombay P. 591 that judgements not inter parties are admissible under section 13 of the Evidence Act to show that the partition deed set up by defendants had been fraudulent and void, but in that case the second suit had been fought out and the same deed set up as a defence, which is not the case here, and that case may be distinguished on that ground.

It is argued that the defendant was responsible for the litigation, as plaintiff was forced by the sale to bring the pre-emption suit.

The person really responsible was the defendant's vendor and if he had been ordered to pay the plaintiffs costs it would have been a proper order. He was however discharged from the suit. I am of opinion that the order of the Lower Appellate Court directing each party to bear its own costs is equitable and should not be disturbed.

The appeal is consequently dismissed.

CIVIL APPEAL NO. 5 OF 1926.

BEFORE Mr. W. T. W. BAKER, I.C.S.

Seth Sobhag Mal Lodha minor son of Seth Abhey Mal Lodha of Ajmer through his next friend Sethani Dolatkanwar widow of Seth Abhey Mal—Original Defendant-Respondent—
Present Appellant.

Versus.

Kistur Chand son of Mundan Mal and Raj Mal son of Kistoor Chand Saraogi of Ajmer—Original Plaintiff-Appellant—
Present Respondent.

(*a*) A court must be taken to have done that which it could only do under the provisions of the law. A mention of a wrong provision in the order will not make that order under that provision. (Case law discussed).

(*b*) When a suit is unsustainable as brought the proper order to pass is to allow the plaintiff to withdraw the suit with leave to bring a fresh suit, and on failure to dismiss the suit. The plaint cannot be ordered to be amended and proceeded with in the same suit. 9 All. 191 P.C. foll.

(*c*) When a case is not dismissed on merits the order is not under O. 17 R. 3. (33 All 690 relied upon), but the order in such cases amounts to a decision on a preliminary point within the meaning of O. 41 R. 23 C. P. C. and a second appeal lies It cannot be said to be an order under S. 151 C. P. C.

(*d*) The expression 'preliminary point' is not confined to such legal point only as may be pleaded in bar of a suit but comprehends all points or issues whether of fact or of law, the determination of which has precluded the necessity for determining other points or issues and such other points or issues have therefore been left undetermined 9 All. 26 (32 note) 10 All. 289 and 16 Mad. 207 foll.

Mithan Lal ... . *Appellant.*

Ghisoo Lal ... . *Respondent.*

ORDER.

A preliminary objection has been raised by the respondent that no appeal lies, because the order of remand is not under order 41 Rule 23 Civil Procedure Code but under Section 151 Civil Procedure Code. No appeal lies against an order remanding a case under section 151.

It is true that the order of remand expressly mentions order 41 Rule 23, but that makes no difference, if the order is not really under that rule.

The respondant relies on the following cases Ram Addhin *Versus* Ram Bharosa I L R. 47 Allahabad page 181 where (at page 184) it is stated that the Court must be taken to have done that which it could only do under the provisions of the law. In that case the decree purported to be under Order XVII Rule 3 Civil Procedure Code, but it was held that it must be taken to have been passed under order XVII Rule 2. Rukam *Versus* Tara Chand 65 I.C. page 775 (Allahabad) and in Mohammed Shah *Versus* Talabhussain Shah A I.R. 1924 Lahore 245, it was held that order 41 Rule 23 applies only where the case has been decided by the First Court on a preliminary issue. The Appellate Court has power to make an order of remand under section 151 only when order 41 Rule 23 does not apply. An order of remand to try the case after amending the plaint is not one under Order 41 Rule 23.

Similarly in Muppavarapu *Versus* Venthurumilli A.I.R, 1925, Madras page 229, it was held that there the trial Court decided all the issues, and the Appellate Court allowed the plaint to be amended and remanded the case for trial on the amended plaint to the Lower Court the order of remand was not one passed under Order 41 R. 23, and was therefore not appealable.

The appellant relies on :—

Mata Din *Versus* Jamna Dass I.L.R. 27 Allahabad page 691 where it was held that it was competent to the Appellate Court to remand a case under Section 562 of the (old) Civil Procedure Code, when the Court of first instance, having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it, leaving other issues undecided. This case follows Sheovar Singh *Versus* Lallu Singh I.L.R. 9 Allahabad page 30 foot note and Ram Chandra Jaishi *Versus* Hazi Kassim I.L.R. 16 Madras 207. He also relies on Kamtu *Versus* Parbhu Dayal I.L.R. 39 Allahabad page 165 which is to the same effect.

The plaintiff sued the defendants for accounts alleging that they had a khata account which defendants in which they borrowed money from time to time and repaid it and that nothing was due from them, on the contrary money was due by the defendants to them.

The defendants denied the plaintiffs claim and pleaded that on the 28th July, 1913, an agreement was come to between the parties when all the previous accounts were settled and on the basis of that agreement a suit No. 77/16 was instituted and ended in a compromise decree and so the suit for rendition of accounts was not maintainable.

The court first framed an issue regarding Court fees which is not material to this appeal and framed the following issues:—

1. Is not the debtor entitled to sue the creditor for rendition of accounts 7 ?
2. Court fees ?
3. Are not the accounts up to 28th July 1913 barred by resjudicata ?
4. To what relief if any is plaintiff entitled ?

Subsequently the claim regarding accounts up to 28th July

1913, was dropped and putting aside the issue regarding Court fees then remained only two issues :—

1. As to the plaintiff's right to rendition of accounts.
2. As to the relief if any to be granted to the plaintiff.

On the first issue the Court held that the plaintiffs were not entitled to rendition of accounts but were entitled to sue defendant the creditor for ascertaining the result of accounts by contrasting the items on either side.

The defendants put in accounts and the plaintiffs were ordered to state what items they denied.

The Court passed various orders with regard to the statement of accounts to be put in by plaintiffs and ultimately dismissed the suit on the ground that the plaintiffs had not complied with the court's orders regarding the submission of statements of accounts.

There was thus no finding on the merits on the issue as to what relief the plaintiffs were entitled to, in order words what was due on taking accounts.

On appeal the Additional District Judge held that the judgment and decree fell within the provisions of order 17 Rule 3, Civil Procedure Code. He framed the following issues :—

1. Whether plaintiffs could claim rendition of accounts from defendants ?
2. Whether there was such disobedience on the part of plaintiffs as would render them liable to have their suit dismissed under Order 17 Rule 3 Civil Procedure Code ?
3. Even If the circumstances justified action under Order 17 Rule 3 was the disposal of the suit just and proper ?

On all these points he found in the negative. He remanded the suit under Order 41, Rule 23 for retrial, and directed that the

plaint should be suitably amended so as to find the specific sum claimed by the plaintiffs, the defendant to put in a new written statement and the plaintiff to be allowed a rejoinder.

The case is peculiar one and some what difficult. No doubt it was held by the Lahore High Court in Mohammed Shah *Versus* Talabhussain Shah A.I.R. 1925 Lahore 245 that an order of remand to try the case after amending the plaint is not one under Order 41, Rule 23, but in that case the first Court's decision was given on the merits and not on a preliminary point.

Similarly in the Madras case (1925 Madras 229) the trial Court decided all the issues.

In the present case there was no decision on the merits of the principal issue. To what relief are the plaintiffs entitled ?

The case was dismissed, not on the merits but because the plaintiffs had failed to comply with the orders of the Court regarding the submission of statements of accounts.

I do not want to go into the merits at this stage but Order XVII, Rule 3, under which the order was apparently made contemplates a decision on the merits on such evidence as is before the Court Cf. Ram Narain *Versus* Jug Deo I.L.R. 33, Allahabad 690.

There has been no such decision here.

The Court has not at all decided what sum if any, is due to the plaintiffs from the defendants but has dismissed the suit. It is true that no specific issue was framed as to the plaintiffs disobedience, but I am of opinion that the suit has been dismissed upon a preliminary point, *viz.,* the failure of the plaintiffs to obey the orders of the court, that amounts to a failure of the plaintiffs, after time had been granted to perform an act necessary to the further progress of the suit. I am not at this stage concerned with the correctness or legality of the order, but only with the fact that the dismisal of the suit is based on the alleged failure of plaintiffs to comply with the orders of the Court, and not on a

finding that no money is due to them. This is a disposal of the suit on a preliminary point within the meaning of Order 41, Rule 23.

The expression "preliminary point" is not confined to such legal point only as may be pleaded in bar of a suit but comprehends all points or issues whether of fact or of law, the determination of which has precluded the necessity for determining other points or issues and such other points or issues have therefore been left undertermined.

Cf. Sheoanbar *Versus* Lallu I.L.R. 9 Allahabad 26 (32 note) Mohammed *Versus* Mahamud I.L.R. 10 Allahabad 289, Ram Chander *Versus* Haji Kassim I.L.R. 16 Madras, 207.

This definition exactly fits the present case the determination of the point that the plaintiff's suit must fail because he had not done what the Court ordered him to do has precluded the necessity for determining the issue whether on the evidence the plaintiff was entitled to recover any money from the defendant.

I am therefore of opinion that the case is covered by the cases quoted above viz Ram Chandra *Versus* Hazi Kassim, I.L.R. 16, Madras 207, Mata Din *Versus* Jamna Das, I.L.R. 27 Allahabad, page 691, Kamto *Versus* Parbhu Dayal. I.L.R 39 Allahabad, page 165 that the order of remand is under order 41, Rule 23, Civil Procedure Code and that therefore the appeal will lie.

The appeal should be set down for hearing on the merits.

FURTHUR JUDGEMENT.

I have written a long order in this appeal deciding the question of whether an appeal lies and held that it does.

The appeal now comes up for hearing on the merits and there is not much to be said as regards these, as the case has not as yet been decided on the merits.

The facts are set out in the preliminary order and need not be repeated.

It has been held by both the courts below that a suit for rendition of accounts would not lie. I have not heard anything in the arguments which would lead me to think that this view is wrong. I agree with the view taken by the lower Appellate Court that the plaintiffs could ask the defendants for a statement of accounts but could only be during the pendency of a suit for the recovery of a specific sum of money filed by the plaintiffs against the defendants.

The objection of the appellant to the remand of the suit is based on the allegation that the plaintiffs are arriving at the sum of 2882/7/6, by deducting certain items of the defendants *viz.*, 5 decrees and of which one has been held by the first court to be one which cannot be set off in the present suit, & the others were obtained not by the present defendants but by the firm of defendants by their father, and by other persons, and what the plaintiffs are trying to do is to obtain a declaration that these decrees have been paid off. The total value of these set off etc., comes to 30,000/-, which is far beyond the Jurisdiction of the Court and they have not paid the Court fee on it. This however is a matter on which there has as yet been no finding at any rate of the Lower Appellate Court. There can be no doubt that the order of the first Court dismissing the suit (which I have already held to be under order XVII Rule 3) was not a proper disposal of the suit.

The only question is whether the order of the lower appellate court remanding the case for trial on an amended plaint should be upheld.

I am aware that this was done in two cases quoted in my preliminary order *viz.* Muppavarapu Versus Venthurumilli A. I. R. 1925 Madras 229, and Mohamad Shah Versus Talabhussain Shah A. I. R, 1925, Lahore 245 without objection as to the propriety of the course so adopted by the first Appellate Court. The point however in both these cases was whether an appeal lay and the/

question of the merits of the order does not seem to have been raised. It was however held by the Privy Council in Ledgard Versus Bull, I.L.R. IX Allahabad 191 that such an order was wrong; in that case the Allahabad High court set aside the whole of the proceedings and directed a new plaint to be presented in the proper court. The Privy Council held that this order equivalent to directing the plaintiff to institute a new suit was wrong and that with only the alternative of having leave to withdraw the suit, and bring a new one, his suit should be dismissed.

In that case the suit was instituted in a Court having no jurisdiction. The Privy Council held that the effect of the decree was to set aside or at least ignore, the whole previous proceedings including the plaint in which the suit originated, as it directs a new and amended plaint to be presented to the Court which is simply equivalent to directing a new suit to be instituted.

In the present case the order of the Lower Appellate Court is practically an order that the suit as brought is unsustainable and ordering not only a new plaint but a new written statement. The whole of the previous proceedings are thus set aside.

I do not think the order is in accordance with the view of the Privy Council in Bull Versus Ledgard, which has not so far as I am aware, been over ruled by a later decision of the Privy Council.

I accordingly set it aside and direct that the plaintiff be given an opportunity of withdrawing the suit with leave to bring a fresh suit, otherwise the suit will be dismissed with costs.

The plaintiff respondants will bear the cost of the appeal, and the costs in the Lower Appellate Court.

CIVIL MISCELLANEOUS APPEAL NO. 19 OF 1926

BEFORE MR. W. T. W. BAKER, I. C. S.

Mr. R. J. Oliver through his mother-in-law
Mrs. E. Roberts ... ... *Appellant.*

Versus.

Mr. J. Back, Foreman, Carriage and Wagon
Shops, Ajmer ... ... *Respondent.*

(*a*) The father is the natural guardian of his children. He may in the exercise of his discretion as guardian, entrust the custody and education of his children to another but the authority he thus confers is essentially a revocable authority, and if the welfare of the children requires it, he can notwithstanding any contract to the contrary, take such custody and education once more into his own hands but the welfare of the minor has to be taken into consideration under S. 25 (1) of the guardians and wards Act.

(*b*) What is for the child's welfare will depend on the circumstances of each particular case but a strong case should be made out for refusing custody to a father.

(*c*) Courts in India exercise equity jurisdiction and a clear discretion is conferred on them by S. 25 of act 8 of 1890 (Guardians & wards) to refuse custody of children to their father if their welfare so demands. This power would be exercised to control the father's or guardian's legal rights of custody when their capricous exercise would materially interfere with the happiness and welfare of the child or when such rights have been forfieted by conduct or acquiesence, or when the father has so conducted himself or is placed in such a position as to render it, not merely better for the children, but essential to their welfare in some very serious or important respect that his rights should be suspended or interfered with.

Sri Lal ... ... *for Appelant.*

M. L. Capoor ... ... *for Respondent.*

ORDER.

This is an appeal from the order of the District Judge Ajmer-Merwara dismissing an application for an order to the respondent to hand over two children to the custody of their father.

The case is a peculiar one. The facts are set out in the judgment of the learned District Judge. The parties are European British subjects.

The facts shortly are that the appellant R. J. Oliver was in embarrassed circumstances in 1924 and also lost his wife. He handed over his two minor children, a boy now aged 7 and a girl now aged 6 to the custody of the respondent. Ever since then the respondent and his wife who have no children of their own, have been maintaining the children as if they were their own. It is admitted that the children are happy and well looked after and the respondent does not claim anything from the appellant for the expenses of their maintenance and education.

R. J. Oliver the father obtained employment with Messrs Bird and Co. Calcutta first at Kudsma and afterwards as Manager of a Manganese Mine at Uliburu in Chota Nagpur, where he is drawing a substantial salary. The children continued to remain with the respondent at Ajmer.

In September 1925 Mr. Oliver married again, his wife being the daughter of Mrs. Roberts who represents him in the proceedings. He then asked for the return of the children but the respondent Mr. J. Back who is the Foreman of the Carriage and Wagon Shops B B. & C. I. Railway, Ajmer refused to give them up on the ground that it was not for their welfare that they should leave Ajmer for Uliburu, which is an uncivilised and out of the way place in the jungle.

The respondent does not claim to have custody of the children permanently but he expressed his intention of sending them to England with his wife next spring at his own expense

and handing them over to the custody of their paternal grandparents there.

It appears also to have been once Mr. Oliver's intention to send the children to his parents in England though he has now rescinded from this position.

The learned District Judge to whom an application was made for the custody of the children refused to hand them over to the father on the ground that it was not for their welfare and the present appeal is against that order.

So far as the facts are concerned there is no dispute and I may say that I agree with the view of the learned District Judge that it is not to the interests of the children that they should be recovered from the custody of the respondent and his wife who have treated them as their own and be sent to live with their father with a step mother who is a stranger to them in a remote place in Chota Nagpur.

Moreover looking to the age of the children who will be 8 and 7 next it is naturally in their interests that they should be sent to their grandparents in England for reasons of health and education as is usually done with European children of that age.

The principal question in this appeal however is whether the order of the District Judge can be supported on grounds of law and I shall principally deal with that question.

The present application is not one under Chapter II of the Guardian and Ward Act 8 of 1890 for the appointment of a guardian but for custody of minors under section 25 of the Act. The learned pleader for the appellant has quoted Sukhdeo Roy Versus Ramchandra Roy I. L. R. 46 Allahabad page 706. In that case the Court laid down that the father is the natural lawful guardian of his minor children and can delegate the daily duty of looking after the child and for that purpose place the child in the custody of some body else. If he does so, it then becomes a question under section 25 of the Guardian and Wards Act for

Court to decide when he applies for the restoration of the custody, whether it is for the welfare of the minor. This case is based on Privy Council's decision in Annie Besant Versus Narainiah I. L. R. 38 Mad. 807, where their Lordships of the Privy Council say "The father is the natural guardian of his children. He may in the exercise of his discretion as guardian, entrust the custody and education of his children to another but the authority he thus confers is essentially a revocable authority, and if the welfare of the children require it, he can notwithstanding any contract to the contrary, take such custody and education once more into his own hands."

In certain cases courts will interfere to prevent the revocation of the authority and Section 25 (1) of the Guardian and Wards Act gives a discretion to the Court in ordering the return of the ward to the custody of the guardian, the criterion being the welfare of the ward.

The appellant further relies on Nazirkhan Versus Ganesh 96 I. C. page 617 which is also based on the Privy Council ruling above quoted. It will appear therefore that the law is that the father is the natural guardian of his minor children and if, as has happened in the present case, he makes over the custody of the children to the third party, he can revoke the authority thus conferred, but the welfare of the minor has to be taken into consideration.

The respondent relies on a passage in Halsbury's Laws of England Volume 17, page 109 where it is stated that when the parent has abandoned or deserted the child or has allowed the child to be brought up by or at the expense of another person or by a school or institution or by the guardians of a poor house union for such length of time and in such circumstances, as to satisfy the Court that the parent has been unmindful of the parental duties owed to the child, the court may not make an order for the delivery of the child to the parent unless satisfied as to

the fitness of the parents to have the custody, having regard to the welfare of the child. This is based on the English Custody of Children Act (54 and 55 Victoria Chap 3) secs. 3 and 5 and on various English cases quoted in the foot note.

What is for the welfare of the child will depend on the circumstances of each particular case but in view of the emphasis laid by the law on the rights of the father, it is, I think, necessary that a strong case be made out for refusing custody.

In the present case it does not appear that the father has paid anything towards the maintenance of the children who have been about 26 months with the respondent, for the 700/- he sent was applied to the payment of debts, etc. in connection with his Marble quarry and not to the expenses of the children. The respondent further relies on the case of " In the matter of Joshi Assan". I. L. R. 23 Calcutta 290 in which it was held, following The Queen Versus Gyngall L. R. Q. B. (1893) Vol. 11. 232 that in courts of equity a discretionary power has always been exercised to control the father's or guardian's legal rights of custody.

That was a case of a rule for an order in the nature of a *Habeas corpus*, and the case was of a peculiar nature since the child was being brought up in comfortable circumstances and the parents were in very poor circumstances and unable to maintain and educate the child as it was being maintained or educated by the opposite party.

That of course is not the case in the present appeal as the appellant is drawing a substantial salary—but courts in India exercise equity jurisdiction and a clear discretion is conferred on the court by section 25 of Act 8 of 1890.

In the Calcutta case above quoted there is a reference to Seton on decrees Volume II page 884 laying down the principle on which courts will interfere as follows :—

" In equity a discretionary power has been exercised to con-

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" In equity a discretionary power has been exercised

trol the father's or guardian's legal rights of custody when their capricious exercise would materially interfere with the happiness and welfare of the child or where such rights have been forfeited by conduct or acquiescence, or where the father has so conducted himself or is placed in such a position as to render it, not merely better for the children, but essential to their safety or to their welfare *in some very serious or important respect* that his rights should be suspended or interferred with."

On page 297 of the same case there is a quotation from the Queen Versus Gyngall L. R. Q. B. (1893) Vol. 11 232 in which (at page 232) the Master of the Rolls said "That its jurisdiction to interfere with the parental right is not confined as was argued, to cases where there has been misconduct on the part of the parent, seems to me clear from many cases. In the case of 'In re Fynn (2),' Knight Bruce V. C. said. "Before this jurisdiction can be called into action, it (that is the Court) must be satisfied not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such description *or is placed in such a position* as to render it not merely better for the children but essential to their safety and to their welfare in some very serious and important respect that his rights should be treated as lost or suspended or should be superseded or interfered with. If the word essential is too strong an expression, it is not much too strong." That is a clear statement that the court must exercise this jurisdiction with great care and can only act when it is shown that either the conduct of the parent, or the description of person, he is, or the position in which he is placed is such as to render it not merely better, I will not say essential, but clearly right for the welfare of the child, in some very serious and important respect' that the parents rights should be suspended or superseded, but that where it is so shown the court will exercise its jurisdiction accordingly." Sale justice then said "That is the principle applicable to the case of parents who have not by their

own act waived or abandoned, in favour of third persons, their parental authority or right."

It is in my opinion the principle governing this case also. For I do not think the fact that a man who has lost his money and his wife left his 2 little children with a friend while he looked for employment can amount to waiving or abandoning his parental authority or right. There is no contention to that effect.

There is also no question of misconduct in the present case. The fact that the father is placed in such a position, i.e., by being Manager of a Manganese mine in a rude and uncivilized place that the children would not have the same facilities for companionship and education that they would have in a comparatively civilized place like Ajmer would hardly be sufficient as the father would send them to School in Calcutta or the hills. There is no evidence with regard to the climate of Uliburu. The fact that the Respondents wife would feel parting with them is also no argument.

The respondent has further relied on some observations of the Privy Council in Besant Versus Narayaniah (I. L. R. 38 Madras 807 at p 829) where it was said that if the authority has been acted upon in such a way as in the opinion of the courts exercising the jurisdiction of the Crown over infants to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint such Court will interfere to prevent its revocation: Lyons V Blenkin (1821, Jacob 245).

In that case the infants were aged abont 17 or 18, had been educated in England for some years at the opponent's expense and were about to enter the Univerity of Oxford and this passage has little bearing in the present case, where the infants are aged 6 or 7.

I have stated above that I have no doubt it is for the welfare

of the infants that they shonld remain where they are and my reasons for so holding are as follows.

The present case presents some special features. In the first place there is no question of permanent gnardianship or of permanent custody. I have already stated that the Respondent Mr. Back has expressed his intention of sending the children to England in the spring, that is in about 6 months from now and handing them over to the parents of the appellant. That practically amounts to handing them over to the custody of the father since when they are with his parents he can do what he likes with regard to them.

The present application therefore is really one relating to the temporary custody of the children for about six months.

I asked the Appellant's pleader whether his client still contemplated sending the children there to his parents, as he at one time intended to do, but he has resiled from this position and said they would go home whenever their father went, which is uncertain.

It may be taken therefore that if the children are handed over to the appellant they will not be sent there next year, or at any rate there is no certainity that they will be sent to school.

In the peculiar circumstances of the present case I think that the decision should be that, in view of the ages of the children it is clerly right for their welfare that they shonld be sent to England and as the respondent has agreed to do this at his own expense not only that but to hand them over to the custody of their grand parents which is practically the custody of the father, the case falls within the principle laid down by the Master of the Rolls in "The Queen Versus Gyngall' supra *viz.* that it is clearly right for the welfare of the children in a very serious and important respect, that they should not be deprived of the opportunity of going to England which will be to their advantage from the point of view both of health and education.

If this had been a case of permanently suspending the guardianship of the father, my decision would have been otherwise, but in the special circumstances of this case *viz*. the limited period during which the guardianship of the father will be suspended and the opportunity of going to England which the children may otherwise lose I am of opinion that the view of the learned District Judge is right.

I may add that in the event of the children not being taken to England next year and handed over to their grandparents the matter would assume a different aspect and it would be of course open to the father to make a fresh application.

The appeal is consequently dismissed.

CRIMINAL REVISION APPLICATION NO. 8 OF 1927.

BEFORE MR. K. W. BARLEE, I. C. S.

Dhumi Khan son of Shafat Khan ... ... *Petitioner*

Versus

Crown ... ... *Respondent*

(*a*) The greater offence includes the lesser and a person accused of an assault on a public servant cannot be convicted also of an offence of obstructing a public servant in the discharge of his public functions. A mere flight of the accused is not such an obstruction.

(*b*) Objection on the score of jurisdiction can be made at any time and need not necessarily be made at the earliest opportunity and it cannot be given up by waiver.

(*c*) It is not illegal in awarding sentence to take into consideration the character of an accused as shown by his previous convictions. But it is illegal to take previous convictions into consideration in determining the question of guilt or innocence.

Abdul Rashid ... ... *Appellant.*

Public Prosecutor ... ... *Respondent.*

ORDER.

The applicant has been convicted and sentenced for three offences in the following circumstances :—Rai Bahadur Piaray Lal, Extra Assistant Commissioner, Ajmer, had occasion to search a motor car as it was suspected that it was being used for smuggling. He found the applicant in the car and informed him that he must allow both the car and his person to be searched. The appellant tried to avoid the search by running away. He was pursued by the Rai Bahadur, and his man, but he stopped them by aiming

revolver at them, first at the Rai Bahadur and later at each of the men, a chaprasi and a motor car driver, respectively. He has been convicted of offences under sections 186, 352 and 353 Indian Penal Code and has been sentenced separately for each offence.

It has been objected that the offence under section 186 was part and parcel of that under section 353. The former section renders a person liable to punishment who obstructs a public servant in the discharge of his public functions, and the latter penalizes any act which amounts to an assault on a public servant in the same circumstances. It is clear that by the act both offences may be committed, but it appears to me that the greater offence includes

[illegible]

. his flight and his assault. But that was not correct for a mere flight cannot amount to obstruction in the sense used in section 186. The word is used in section 339 which shows that it means the preventing a person from proceeding in any direction. This is the natural meaning and I cannot agree that by running away the applicant prevented the excise officer and his men from proceeding in any direction. The conviction under this section is therefore, bad. There is a further objection that the Magistrate had no jurisdiction to take cognizance of an offence under section 186 since the Extra Assistant Commissioner did not make a complaint in writing. An objection on the score of jurisdiction can be made at any time, and need not necessarily be made at the earliest opportunity. Jurisdiction cannot be given up by waiver.

The offence under section 352 Indian Penal Code is said to have been committed when after the Extra Assistant Commissioner had abandoned the pursuit the applicant saved himself from arrest at the hands of Nawal Ram the motor driver by aiming his revolver at him. It has been contended that he was

within his *rights*, and that is correct, Nawal Ram was *not* a public officer and had no authority to make an arrest; and as the Extra Assistant Commissioner was neither a Magistrate nor a police officer, he could not invest him with authority by ordering him or calling on him to render assistance.

There remains the offence under section 353 Indian Penal Code and as regards this the only plea is that the sentence was made unduly severe because the learned Magistrate unlawfully took into consideration a previous conviction under Sections 457 and 387. The procedure adopted by him was certainly incorrect, he charged the applicant with that previous conviction though the offence embodied in the principal charge were not punishable under chapter XII or Chapter XVII of the Indian Penal Code. But that was an irregularity and not an illegality.

It is not illegal in awarding sentence to take into consideration the character of an accused as shown by his previous convictions. This is frequently necessary. What is illegal is to take previous convictions into consideration in determining the question of guilt or innocence, that is to say the error in this case is at most the receiving of evidence of character which was inadmissible. But that error is curable under section 167 of the Indian Evidence Act, and the only question is whether, apart from the evidence of character, there was on record sufficient evidence to show that the applicant was guilty. Of that there is no doubt, and I see no reason to interfere with either the conviction or the sentence under section 353 Indian Penal Code.

[illegible] under section

1 [illegible] -ection 353 are

confirmed.

revolver at them, first at the Rai Bahadur and later at each of the men, a chaprasi and a motor car driver, respectively. He has been convicted of offences under sections 186, 352 and 353 Indian Penal Code and has been sentenced separately for each offence.

It has been objected that the offence under section 186 was part and parcel of that under section 353. The former section renders a person liable to punishment who obstructs a public servant in the discharge of his public functions, and the latter penalizes any act which amounts to an assault on a public servant in the same circumstances. It is clear that by the act both offences may be committed, but it appears to me that the greater offence includes the lesser and that a person accused of causing obstruction by means of an assault should not be convicted of both. This was evidently the view held by the learned Magistrate for he convicted the applicant for two distinct offences, his flight and his assault. But that was not correct for a mere flight cannot amount to obstruction in the sense used in section 186. The word is used in section 339 which shows that it means the preventing a person from proceeding in any direction. This is the natural meaning and I cannot agree that by running away the applicant prevented the excise officer and his men from proceeding in any direction. The conviction under this section is therefore, bad. There is a further objection that the Magistrate had no jurisdiction to take cognizance of an offence under section 186 since the Extra Assistant Commissioner did not make a complaint in writing. An objection on the score of jurisdiction can be made at any time, and need not necessarily be made at the earliest opportunity. Jurisdiction cannot be given up by waiver.

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The result is that the conviction and sentence under section 186 and section 352 are set aside and those under section 353 are confirmed.

CRIMINAL REFERENCE NO. 26 OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Crown ... ...

Versus.

(1) Hazari, (2) Hari Ram, (3) Bhari Mal, (4) Rada Lal, (5) Har Deo, (6) Khajju, (7) Sukhdeo, (8) Gokal, (9) Govind, (10) Sheo Nath, (11) Jaideo, (12) Sakwan, (13) Rang Lal, (14) Rughnath, (15) Moti, (16) Sagram, (17) Godhia and (18) Phula, Gujars, of Chatri ... ...

(*a*) The provisions as to joint trials in the Criminal Procedure Code do not apply to commitment proceedings.

(*b*) By virtue of S. 28 of the Cr. P. Code any offence under the Indian Penal Code can be tried by the Sessions Court and a commitment for an offence under S. 147 I.P.C. is not illegal if the Magistrate thinks that he cannot adequately punish the accused.

ORDER.

Twenty accused persons were committed to the Court of Sessions, the charge being, substantially, that they had all taken part in a riot in which a man Nahra received injuries of which he died. The committing Magistrate however framed a seperate charge against each of the accused, charging two of them under Sec. 304-147, and the remainder under Section 147 only. Before the trial began in the sessions Court, the defence raised an objection that the eighteen accused who were charged with rioting only should not be tried with those who were charged under section 304 and 147, and the learned Additional Sessions Judge being doubtful if the common object of the two accused charged with the more serious offence was the same as that of the eighteen

others, thought that a joint trial was inadmisable. He therefore went on with the trial of the accused charged under Sections 304 and 147, and holding that the offence defined in Section 147 is not triable by a Court of Sessions, referred the case to this court under Section 438 Criminal Procedure Code.

Under Section 215 a commitment once made can only be quashed by this Court on a point of law and I have therefore to see whether such a point exists in this case. The joint commitment of all the accused is not such a point for it was not illegal, the provisions as to the joint trials in the code not applying to commitment processings and there being nothing to prevent seperate trial being held in the Sessions court, as has been done in this case. 26 Madras page 592. The Learned Judge's reason for the reference is also clearly-wrong. It is true that Schedule II of the code, section 147, column 8 shows that an offence under that section is triable by "any Magistrate". But section 28 of the Code lays down that any offence under the Indian Penal Code may be tried. "By the Court of sessions," and accused were charged under the Indian Penal code. The law is so clear that authority is scarcely needed, but there is actually a ruling on the very section (147 Indian Penal Code) in question to be found in Indian Law Reporter 1924 Calcutta page 429. The High Court there held that a commitment for an offence under section 147 was valid, if made in accordance with the provisions of section 254 for though the maximum sentence of imprisonment under that section is two years a sentence which a Magistrate is competent to inflict, the fine which may be imposed is unlimited, and a Magistrate's powers to fine are not. In that case the comitment was quashed, because the Magistrate had not said in his order that he could not adequately punish the accused.

I must therefore see whether the reason for committing the accused in this case is good, or not. The committing Magistrate held that the offence under section 304 and the one under section 147 were committed in the course of the same transaction. It is

My difficulty is that no reference under section 439 of the Criminal Procedure Code was competent in the circumstances.

5. The Criminal Procedure Code does not contemplate the disposal of appeals on preliminary points. Section 421 provides for summary disposal but if an appeal is not disposed of summarily, notice must issue to the persons and officers indicated (Sec. 422) and, next, under section 423, the court must dispose of the appeal in one of the several ways indicated in that section. There is no other possible course. The analogy of Civil law, in which an appeal may be disposed of on a preliminary point, is a false one, and no short cuts to disposal are contemplated in the code. In this case nothing has so far been done, and the appeals are still before the sessions court. It is true that in a cognate case this court has decided that the accused did not have a fair trial and has ordered a retrial on one charge, but it does not follow that a retrial is necessary on these two separate appeals. It may be that there is no evidence to warrant another trial, and that the accused is entitled to an acquittal on some, or perhaps all, the charges against him and until this has been decided it would obviously be wrong for this court to order retrials and subject the appellant to the expense, trouble and ignominy of two more trials.

6. It is also true that the learned sessions Judge has already recorded an opinion on what he deemed to be a preliminary point, but he *had no jurisdiction to do so, and was bound to decide the* two appeals, for or against the appellant, as the case may be. He has therefore not recorded a judgment, and until he does, there can be no possible ground for a reference to this Court; and no ground will remain when he has for if still aggrieved, the appellant can then file revision applications.

7. I think the learned Additional Sessions Judge's order so far recorded, does not amount to a judgment. If, after hearing the appeals on the merits comes to the conclusion that a

retrial is necessary, the order already recorded will look foolish, but that is the penalty of haste.

8. I refuse to pass any orders on the reference, return the records and direct the Additional Sessions Judge to hear and dispose of these appeals according to law.

9. In view of the fact that they have been pending for no intelligible reason, since February of this year a speedy disposal is obviously desirable in the interests of justice.

CRIMINAL APPLICATION NO. 53 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Ramzan Alias Allah Bux son of Abdul Rahman Musalman of Deogarh ... ... *Applicant.*

Versus.

Crown ... ... *Opposite party.*

(*a*) Corporeal contact is not the physical element which is involved in the legal conception of possession though it may be an element.

(*b*) In order to constitute possession in a legal sense, there must exist not only the physical power to deal with a thing as one likes and to exclude others, but also the determination to exercise that power on one's own behalf.

(*c*) When an article like illicit opium is secretly placed by its owner in a very unlikely place for it to be in, the object clearly is to retain the possibility of dealing with it as the owner chooses and to exclude others—secrecy taking the place of locks and bolts.

Ghisoo Lal ... ... *Appellant.*
Public Procecutor ... ... *Respondent.*

evident from his order that what he found was that offences were committed in the course of an attack by the members of one faction on some of the men of the other, and he might have, though he did not, framed a charge under section 149 Indian Penal Code. On his view of the evidence I think the commitment was legal, and the fact that the sessions court has held a separate trial of some of the accused, who it considered had committed graver offence, does not invalidate it. I can only quash the commitment on a point of law and as nothing either illegal or irregular has taken place, there is no ground for my interference.

I return the papers to the Sessions Court and direct it to proceed with the trial of the remaining accused, as soon as possible.

CRIMINAL REFERENCE NO. 52 OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Chitar Mal son of Moti Lal Saraogi of Kekri.
Accused ... ... *Appellant.*

Versus.

The crown ... ... *Respondent.*

(*a*) A review is not a proceeding known to the Criminal Law.

(*b*) The Criminal Procedure Code does not contemplate the disposal of appeals on preliminary points. If an appeal is not disposed of summarily a notice must issue to the other side.

ORDER.

1. I have heard the learned Public Prosecutor and the accused on this reference. There were 3 Criminal appeals pending before the learned sessions Judge by the same appellant

from convictions in connected matters under section 409 Indian Penal Code. These appeals came on for hearing on the 28th February 1927. They were not however disposed of—the hearing being confined to what was called a 'preliminary point'—really one of the grounds of appeal. The learned Additional Sessions Judge then recorded an order finding against appellant and postponed the hearing to the 25th July 1927. Why it was necessary to allow 5 months to elapse before these ordinary appeals could be disposed of is not stated.

2. The hearing of one of the three appeals was taken up on the 25th July & was finished on the 29th. Judgment was postponed to the 15th August, when it was pronounced, confirming the conviction and sentence. There was then an application for revision to this Court (No. 39 of 1927) which on the 20th. September 1927, set aside the conviction and sentence on the grounds that applicant had not had a fair trial, and no proper judgment had been recorded, and ordered him to be retried on one of the charges against him.

3. Meanwhile, the other 2 appeals by the accused had been pending unheard, and on the 5th September were fixed for the 14th September, but the hearing was postponed to the 22nd September various fresh dates were fixed, and some arguments were heard on odd days, and finally the learned Additional Sessions Judge made the reference to this court on the 20th October 1927, which I now have to deal with. The point of the reference is that the learned sessions Judge is in doubt whether he can review his order of the 28th February 1927, though he inclines to the belief that he can since it was only preliminary and not final.

4. But a review of its own judgment by the Sessions Court is not a proceeding known to the criminal law; and if his order of the 28th February 1927 is a judgment, he cannot review it.

My difficulty is that no reference under section 439 of the Criminal Procedure Code was competent in the circumstances.

5. The Criminal Procedure Code does not contemplate the disposal of appeals on preliminary points. Section 421 provides for summary disposal but if an appeal is not disposed of summarily, notice must issue to the persons and officers indicated (Sec. 422) and, next, under section 423, the court must dispose of the appeal in one of the several ways indicated in that section. There is no other possible course. The analogy of Civil law, in which an appeal may be disposed of on a preliminary point, is a false one, and no short cuts to disposal are contemplated in the code. In this case nothing has so far been done, and the appeals are still before the sessions court. It is true that in a cognate case this court has decided that the accused did not have a fair trial and has ordered a retrial on one charge, but it does not follow that a retrial is necessary on these two separate appeals. It may be that there is no evidence to warrant another trial, and that the accused is entitled to an acquittal on some, or perhaps all, the charges against him and until this has been decided it would obviously be wrong for this court to order retrials and subject the appellant to the expense, trouble and ignominy of two more trials.

6. It is also true that the learned sessions Judge has already recorded an opinion on what he deemed to be a preliminary point, but he had no jurisdiction to do so, and was bound to decide the two appeals, for or against the appellant, as the case may be. He has therefore not recorded a judgment, and until he does, there can be no possible ground for a reference to this Court; and no ground will remain when he has for if still aggrieved, the appellant can then file revision applications.

7. I think the learned Additional Sessions Judge's order so far recorded, does not amount to a judgment. If, after hearing the appeals on the merits he comes to the conclusion that a

retrial is necessary, the order already recorded will look foolish, but that is the penalty of haste.

8. I refuse to pass any orders on the reference, return the records and direct the Additional Sessions Judge to hear and dispose of these appeals according to law.

9. In view of the fact that they have been pending for no intelligible reason, since February of this year a speedy disposal is obviously desirable in the interests of justice.

CRIMINAL APPLICATION NO. 53 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Ramzan Alias Allah Bux son of Abdul Rahman Musalman of Deogarh ... ... *Applicant.*

Versus.

Crown ... ... *Opposite party.*

(*a*) Corporeal contact is not the physical element which is involved in the legal conception of possession though it may be an element.

(*b*) In order to constitute possession in a legal sense, there must exist not only the physical power to deal with a thing as one likes and to exclude others, but also the determination to exercise that power on one's own behalf.

(*c*) When an article like illicit opium is secretly placed by its owner in a very unlikely place for it to be in, the object clearly is to retain the possibility of dealing with it as the owner chooses and to exclude others—secrecy taking the place of locks and bolts.

Ghisoo Lal ... ... *Appellant.*
Public Prosecutor .. .. *Respondent.*

JUDGMENT.

1. The only point in this application is whether there is evidence which if believed is sufficient to support the conviction of the applicant under the Opium Act.

2. The facts are that so large a quantity of opium as 4 mds. and 5½ seers was found by some P. W. D. road gangmen accidently under a culvert on the 2nd May last.

3. The matter was reported to the Excise Authorities who recovered the opium the same night. Two days later three men one of whom was the applicant came and began to make inquiries of the gangmen as to what had become of the opium. They were induced to accompany the mate of the gang. But two slipped away. The applicant was led to the Kotwali and was there arrested. He has been convicted of being in possession of the opium under section 9 C. of the Opium Act (I of 1878).

4. The question is whether applicant can be said to have been proved to have possessed opium. Possession may of course be constructive but none of the cases quoted to me, which turn on possession of railway receipts and similar documents, is exactly in point.

5. Now corporeal contact is not the physical element which is involved in the legal conception of possession though it may be an element. It is rather the possibility of dealing with a thing as one likes and of excluding others. This can very clearly be recognized if we consider the various modes in which possession is gained or lost.

6. Again, the physical element forms only one portion of the conception of possession. In order to constitute possession in a legal sense, there must exist not only the physical power to deal with a thing as one likes and exclude others, but also the determination to exercise that power on our own behalf.

7. Now when an article like illicit opium is secretly placed by its owner in a very unlikely place for it to be in, the object clearly is to retain the possibility of dealing with it as the owner chooses and to exclude others—secrecy taking the place of locks and bolts. The persons who placed the opium in the sand under the culvert here clearly continued to possess it.

8. If there is any evidence to show that applicant was determined to exercise the power of dealing with it as he liked and of excluding others on his own behalf, his legal possession of the opium would be complete.

9. On going through the record I think there is such evidence. The 3 principal witnesses Ramchandra Singh, Chaina and Bhawana have been believed by both the courts below. There is in fact no reason for disbelieving them. On the statement of the last two it has been shown that the applicant went to them and asked them what had happened to his bags which had been dropped near the culvert, and offered them rewards for a clue.

10. On that of Ramchandra Singh it has been established that applicant and his two friends opened negotiations for the bags which they admitted contained opium and enlisted his help in an attempt to get them back.

11. It has been argued that applicant may have been an innocent agent of the other two, who slipped away in time and escaped, but this was not his defence and if what Ramchandra Singh says is true, is not consistent with his part in the affair. His conduct was that of a person having such a possession as I have found might still exist on the facts in this case—a power to deal with the opium and to exclude others—and I think there is no doubt that when he and his associates found that their hoard of opium had been discovered they set about devising means to recover it as stated.

12. The sentence is severe but the quantity of illicit opium

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12. The sentence is severe but the quantity of illicit opium

being dealt with was very large indeed and shows that the trade in it in which applicant was concerned was wholesale.

13. I think the conviction is valid and the sentence proper.

14. I dismiss this application.

CRIMINAL REFERENCE NO. 54 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Sheoji Ram of Ajmer ... ... Accused—*Appellant*,

Versus.

Crown ... ... *Respondent.*

(a) Substituting a fine for imprisonment does not amount to an enhancement of the sentence.

Shyam Swarup Mathur ... ... *Appellant.*

Public Proceeutor ... ... *Respondent.*

ORDER.

1. This is a reference under section 439 Criminal Procedure Code by the Sessions Judge Ajmer. The appellant before the Sessions Judge was convicted under section 279 Indian Penal Code and sentenced to suffer a months rigorous imprisonment and to pay a fine of 100/—or in it's default to suffer a week's impr'sonment. The learned Sessions Judge considers the conviction proper, but thinks a fine only should have been inflicted and that a sentence of imprisonment was not desirable in the circumstances.

2. I have heard counsel for the Crown and for appellant. There is a conflict of opinion among the High Courts on the point whether substituting a fine for imprisonment is or is not an enhancement, but the more recent view is that ordinarily it is not;

and I have so held in this Court. Appellant's Counsel admits his client would rather pay the extra Rs 50/—than go to prison for a month.

3. I think the learned Sessions Judge could himself have passed the order he desires: but since the reference has been made I substitute a fine of Rs. 50/- (fifty) for the sentence of one month's imprisonment passed on appellant.

CIVIL REVISION APPLICATION NO. 1 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

The B. B. &. C. I. Railway company through its Agent at Bombay ... ... Defendant—*Applicant.*

Versus.

Messrs Rati Ram Gheesa Ram Contractor P. W. D., Mount Abu ... ... Plaintiff—*Opposite party.*

The words 'without prejudice' have no meaning and an offer though qualified by these words does amount to an acknowledgment of liability within the meaning of the Limitation act and saves limitation.

R. S. Mathur ... ... *Appellant.*

B. D. Khanna ... ... *Respondent.*

ORDER.

The plaintiffs in this case booked a consignment of teak from Bombay to Abu Road on the 13th May 1921. This appears to have been the last heard of the consignment, till 30-6-1922, when the Railway Company informed the plaintiffs that the wood was lying at Abu Road, and asked them to take delivery. The Railway administration then served plaintiffs with a notice

Section 55 and 56 of the Railways Act but as plaintiffs refused to take delivery and demanded Rs. 466/4/–as compensation, the wood was sold by the Company for Rs. 269/12/4 about January 1923. Plaintiffs were offered this amount but declined to accept it, apparently demanding more. According to the plaint plaintiff ultimately despaired of recovering more, and then brought this suit. The Company did not appear and the claim was decreed exparte against them. The company now apply for revision on the ground that the claim was barred by limitation.

Though the suit was brought more than three years from January 1923, when the amount was realised by the Railway Company, the small Cause Court has held that the defendant's letter of the 6th June 1923 reminding plaintiffs of an offer of 24-1-23 of Rs. 269/12/- in full and final satisfaction of the claim, and asking for acceptance of the offer, operates as an acknowledgment and saves limitation. The argument now is that the words "without prejudice" in that letter make it inadmissible against the defendants. It has also been argued that section 10 of the Limitation Act applies, but I do not think the railway company was in the position of a trustee and I believe it does not. As to the words, "without prejudice" there is no clear ruling in India, but as used in the letter in question, they have no real meaning for it did not contain an offer to compromise but only asked the plaintiffs to come and take away their money. If the defendant company relied on their meaning anything else, it should have contested the suit and led evidence on the point.

I dismiss this application with costs.

CIVIL REVISION APPLICATION NO. 18 OF 1927.

BEFORE MR. S. J, MURPHY, I. C. S.

Mir Syed Ali, Islam Ali sons of Mir Gulam Ali, (3) Syed Hamid Hussain son of Syed Mohammed Hussain, (4) Syed Zulfiqar son of S. Nurul Hussain, (5) Syed Saddiq Ali son of S. Jafar Ali and (6) S. Nafasat Hussain son of Karamat Ali Pirzadas of Ajmer.

Original Plaintiffs,—*Applicants.*

Versus.

The Durgah Khawaja Sahib Ajmer through K. S. Abdul Wahid Khan, President and Mohammed Hussain son of Hafiz Mardan Ali (deceased), Abdul Latif, Sheikh Tassadduk Hussain members of Durgah Committee Ajmer.

Defendants—*Opposite Party.*

(1) The Pirzadas do not perform any duties and are not recognised by Mohamadan law as a class.

(2) Questions of law or mixed fact and law whether rightly or wrongly decided are not questions involving the jurisdiction of the Court, its exercise or a refusal to exercise it, or an irregular or illegal exercise of it and are hence not revisable.

Parmatma Swarup .... *Appellant.*

Ghisoo Lal ... ... *Respondent.*

JUDGMENT.

There is a social custom in Rajputana which requires that on a death occuring in a family its relatives or friends should send a present of cooked food, the reason being that no cooking may be done on that day in deceased's house.

Plaintiffs are some of the Pirzadas, that is the descendants of the family of the founder of the Dargah Khawaja Sahib and their case is that on the death occuring in their family the Managing Committee of that institution is bound to send them 'Khichri' which it is said has since been commuted to a cash payment of Rs. 3 per death: the idea being that by analogy the custom holds as between the Dargah Khawaja Sahib and its founder's descendants. The managing Committee of the Dargah admitted that such payments had been made in the past: but pleaded that they had been gratuitous and in the nature of alms and that payment could not be enforced by suit.

The Courts have held that the claim is not maintainable under section 9 of the Civil Procedure Code as it is not one of a Civil nature. By the explanation to Section 9 to succeed the plaintiffs must show that their claim is one to property, or to an office.

I think it has rightly been held that the claim is not one to an office. If it were the office would be that of birth into the Pirzada family and loss of a relative: and this is hardly an office in the ordinary meaning of the term.

What applicants really claim is a right to property, and payment of Rs. 3 on the occuring of a certain event; and whether they can sue or not, depends on whether they have been paid as of right, or only by way of gift. The payment cannot be traced to any bequest of the founders of the Shrine, or to any condition so laid on the management, & if they rest on anything substantial, it can only be custom, for admittedly Pirzadas, as such, perform no duties and are not recognized by Mohammadan law as a class.

The defendants respondents have admitted that in the past they and their predecessors had made such payments: but have pleaded that the payments were only by way of assistance, and as the analogy of the social custom, and not of sums legally due to the Pirzadas.

The finding challenged therefore is in substance that the courts below have decided the question whether the right has been made out or not: and whether the payments are enforceable at law or not, a question at best of mixed fact and law wrongly.

But this a revision application and it has been repeatedly held by this court that questions of law or mixed fact and law, whether rightly or wrongly decided are not questions involving the jurisdiction of the Court, its' exercise or a refusal to exercise or an irregular or illegal exercise of it.

The Courts below have exercised jurisdiction and have not acted in an irregular or illegal manner. That their decision may be wrong in law or fact, is not a point of jurisdiction giving this Court power to interfere with their findings, and since no second appeal lies, this Court cannot interfere. I think the application is not competent and I dismiss it with costs.

CIVIL REVISION APPLICATION NO. 32 A OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Balu Ram son of Ram Narain Mahajan, Maheswari of Pushkar ... ... Appellant—*Applicant.*

Versus

Firm Paras Ram Gulab Chand through Musammat Badam Kanwar widow of Gulab Chand as owner of the firm and guardian of her minor son Ratanlal through Mool Chand, Mukhtar.

Opposite Party.

Plaintiffs are some of the Pirzadas, that is the descendants of the family of the founder of the Dargah Khawaja Sahib and their case is that on the death occuring in their family the Managing Committee of that institution is bound to send them 'Khichri' which it is said has since been commuted to a cash payment of Rs. 3 per death: the idea being that by analogy the custom holds as between the Dargah Khawaja Sahib and its founder's descendants. The managing Committee of the Dargah admitted that such payments had been made in the past: but pleaded that they had been gratuitous and in the nature of alms and that payment could not be enforced by suit.

The Courts have held that the claim is not maintainable under section 9 of the Civil Procedure Code as it is not one of a Civil nature. By the explanation to Section 9 to succeed the plaintiffs must show that their claim is one to property, or to an office.

I think it has rightly been held that the claim is not one to an office. If it were the office would be that of birth into the Pirzada family and loss of a relative: and this is hardly an office in the ordinary meaning of the term.

What applicants really claim is a right to property, and payment of Rs. 3 on the occuring of a certain event; and whether they can sue or not, depends on whether they have been paid as of right, or only by way of gift. The payment cannot be traced to any bequest of the founders of the Shrine, or to any condition so laid on the management, & if they rest on anything substantial, it can only be custom, for admittedly Pirzadas, as such, perform no duties and are not recognized by Mohammadan law as a class.

The defendants respondents have admitted that in the past they and their predecessors had made such payments: but have pleaded that the payments were only by way of assistance, and as the analogy of the social custom, and not of sums legally due to the Pirzadas.

The finding challenged therefore is in substance that the courts below have decided the question whether the right has been made out or not: and whether the payments are enforceable at law or not, a question at best of mixed fact and law wrongly.

But this a revision application and it has been repeatedly held by this court that questions of law or mixed fact and law, whether rightly or wrongly decided are not questions involving the jurisdiction of the Court, its' exercise or a refusal to exercise or an irregular or illegal exercise of it.

The Courts below have exercised jurisdiction and have not acted, in an irregular or illegal manner. That their decision may be wrong in law or fact, is not a point of jurisdiction giving this *Court* power to interfere with their findings, and since no second appeal lies, this Court cannot interfere. I think the application is not competent and I dismiss it with costs.

CIVIL REVISION APPLICATION NO. 32-A OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Balu Ram son of Ram Narain Mahajan, Maheswari of Pushkar ... ... Appellant—*Applicant.*

Versus

Firm Paras Ram Gulab Chand through Musammat Badam Kanwar widow of Gulab Chand as owner of the firm and guardian of her minor son Ratanlal through Mool Chand, Mukhtar.

Opposite Party.

Plaintiffs are some of the Pirzadas, that is the descendants of the family of the founder of the Dargah Khawaja Sahib and their case is that on the death occuring in their family the Managing Committee of that institution is bound to send them 'Khichri' which it is said has since been commuted to a cash payment of Rs. 3 per death: the idea being that by analogy the custom holds as between the Dargah Khawaja Sahib and its founder's descendants. The managing Committee of the Dargah admitted that such payments had been made in the past: but pleaded that they had been gratuitous and in the nature of alms and that payment could not be enforced by suit.

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I think it has rightly been held that the claim is not one to an office. If it were the office would be that of birth into the Pirzada family and loss of a relative: and this is hardly an office in the ordinary meaning of the term.

What applicants really claim is a right to property, and payment of Rs. 3 on the occuring of a certain event; and whether they can sue or not, depends on whether they have been paid as of right, or only by way of gift. The payment cannot be traced to any bequest of the founders of the Shrine, or to any condition so laid on the management, & if they rest on anything substantial, it can only be custom, for admittedly Pirzadas, as such, perform no duties and are not recognized by Mohammadan law as a class.

The defendants respondents have admitted that in the past they and their predecessors had made such payments: but have pleaded that the payments were only by way of assistance, and as the analogy of the social custom, and not of sums legally due to the Pirzadas.

The finding challenged therefore is in substance that the courts below have decided the question whether the right has been made out or not: and whether the payments are enforceable at law or not, a question at best of mixed fact and law wrongly.

But this a revision application and it has been repeatedly held by this court that questions of law or mixed fact and law, whether rightly or wrongly decided are not questions involving the jurisdiction of the Court, its' exercise or a refusal to exercise or an irregular or illegal exercise of it.

The Courts below have exercised jurisdiction and have not acted in an irregular or illegal manner. That their decision may be wrong in law or fact, is not a point of jurisdiction giving this Court power to interfere with their findings, and since no second appeal lies, this Court cannot interfere. I think the application is not competent and I dismiss it with costs.

CIVIL REVISION APPLICATION NO. 32-A OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Balu Ram son of Ram Narain Mahajan, Maheswari of Pushkar ... ... Appellant—*Applicant.*

Versus

Firm Paras Ram Gulab Chand through Musammat Badam Kanwar widow of Gulab Chand as owner of the firm and guardian of her minor son Ratanlal through Mool Chand, Mukhtar.

Opposite

(a) When security is furnished by the defendant before an attachment is actually effected no application under S. 95 C.P.C. lies.

Mithan Lal	...	...	..	... *Appellant.*
Prabhu Dayal	..	...	...	... *Respondent.*

ORDER.

The grievance alleged in this matter is that both the courts below have "failed to exercise a jurisdiction vested in them by law"

The facts are that the plaintiff in the matter had obtained an order for attachment before judgment: but the attachment was never effected as security was furnished by defendant. Defendant afterwards made an application under section 95 Civil Procedure Code. His application was dismissed because it was held that no attachment had in fact been effected, and that the case did not therefore fall within the section. On appeal the learned District Judge dismissed the appeal on the same ground.

It seems to me quite clear that both the Courts below duly exercised the jurisdiction. Applicant failed not because they refused to do so but for lack of a case under the section. The point involved is one of the interpretation of section 95, and not of jurisdiction and does not arise in revision.

I dismiss this application with costs.

CIVIL REVISION APPLICATION NO. 40 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Behari Lal and Gheesa Lal son of Sohan Lal Agarwal of Nasirabad ... ... Plaintiff,—*Applicants.*

Versus.

Ahmed son of Babar Musalman of Nasirabad.

Defendant,—*Opposite party.*

(*a*) When there is a stipulated rate of interest the Court must allow it however high it may be.

(*b*) If it is penal the Court may award it at such rate as is reasonable and when it is not penal the Court may reduce it if it is excessive and the transaction was substantially unfair under S. 74 of the Contract Act and S. 3 of the Usurious Loans Act 10 of 1918.

Defendant admitted plaintiff's claim for Rs. 82/- but protested against the rate of interest and prayed for instalments. Plaintiff agreed to instalments. The rate of interest was Rs. 2/- per month. The learned sub Judge said he thought this excessive and reduced it to 6°/₀ per annum. He ordered instalments of Rs. 5/- The application is against the reduction in the rate of interest. The suit was on a hypothecation bond of an ekka and pony and interest equal to the amount or principal was claimed.

The learned Small Cause Court Judge has not stated the law under which he has reduced the stipulated rate of interest.

Where there is such a rate the Court must allow it however high it may be (Usury Law Repeal Act 28 of 1855 Section 2) but if it is penal the Court may award interest at such rate as is reasonable and where it is not penal the Court may reduce it if it is

excessive and the transaction was substantially unfair (Contract Act Section 74 and Usurious Loans Act 10 of 1918 Section 3).

Since there was a rate here stipulated and it was not penal or particularly excessive and it has not been found that the transaction was substantially unfair the learned sub Judge's arbitrary reduction is illegal. I vary his decree and allow plaintiff interest at Rs. 2 per month, from date it became payable to date of suit: and at 6 percent from date of suit to realization, otherwise the decree is confirmed.

Applicant to have his costs of this appeal.

CIVIL REVISION PETITION NO: 48 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Lachmi Narayan son of Kani Ram Mahajan Agarwal of Beawar. ... ... Defendant,—*Applicant.*

Versus.

Radha Raman son of Ram Jiwan of Ajmer.

Plaintiff, . *Opposite party.*

(a) Even if there is no "sufficient causes" for default the Courts have inherent powers under S. 151 C. P. C. to restore a suit dismissed for default in proper circumstances.

Suraj Karan ... ... *for Applicant.*
Mithan Lal ... ... *for Opposite Party.*

ORDER.

This is an application against an order made by the Sub-judge First Cirst Class and Treasury Officer Ajmer directing the restora-

tion of a suit dismissed for default on the plaintiff paying Rs. 50/- costs to the other side.

The facts were that on the day the case fixed for hearing R. S. Mithan Lal the principal Advocate engaged for plaintiff was unable to attend owing to domestic afflictions in the shape of illness in his family. He however sent his clerk to make inquiries whether the case would be taken or not and came later when the case had already been dismissed and the Court had risen.

The plaintiff is a Sub-Inspector of Police then stationed at Abu and Mr. MithanLal says he conld not come. There were however two more pleaders who had filed their powers in the case Messrs Jasodha Nandan and Daya Shanker and no explanation of their absence, except that the arrangement was that Mr. Mithan Lal should conduct the case that day, has been offered. The learned Sub-Judge has found that 'sufficient cause' has not been made out, but he has as a matter of grace restored the suit and this is the ground on which his order is attacked. I am not sure that the circumstances and misunderstandings detailed above do not amount to 'sufficient cause': but assuming that the learned Sub Judge is right in thinking that they do not, it has been ruled by the Allahabad and Bombay High Courts that there is an inherent power to restore a suit dismissed for default in proper circumstances. In this case there was some reason for the failure to attend in time and I am not prepared to say that a wrong discretion to restore has been exercised.

I dismiss the application but since Plaintiff's side is responsible for it ultimately I make no order as to costs.

CIVIL REVISION APPLICATION NO. 59 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Musammat Nathi widow of Mohan Lal, guardian of her minor son Amar Chand son of Mohan Lal Maheshri of Pisangan,
Plaintiff,—*Appellant.*

Versus.

Jagrup son of Bhian caste Jat of Hanwant Pura.
Defendant,—*Opposite Party.*

When a conditional decree becomes final on the failure of the judgement—debtor to comply with its terms, it is incapable of being varied by the original Court except by means of a review 35 All. 582 relied upon. S. 148 of the C. P. C. has no application after a decree has been passed.

H. C. Sogani ... ... *Appellant.*

ORDER.

In this matter the claim was admitted and the learned Sub Judge made an order for an instalment decree conditional on the defendant furnishing security not to remove his cattle into Marwar. The security was to be furnished by the 12th January 1927, and failing its being furnished the amount was to be recoverable in a lump sum at once. For various reasons the security was not furnished by the 12th January 1927, but it was finally accepted on the lst March 1927 and I am told two instalments have since been paid. The argument before me is that though the original Court could make a conditional instalment decree as it did under order 20 Rule 11 it could not under Section 148 vary the terms of its own decree, though had there not been a decree it could under that section certainly extend any time granted. There has been some conflict of decision on the point but the leading case

is that reported at 35 Allahabad page 582 Suranjan Singh Versus Rambahal Lal. This was a pre-emption suit, but there is no essential difference between such a suit and others and the case of redemption suits is special and provided for by order 34 Rule 8. I think that once having made the decree, and the Judgment debtor having failed to comply with it: the decree became, for the original Court, final and incapable of being varied by it except by means of a review.

I accept the application and set aside the Courts order for instalments of the 1st March 1927. Applicant to have the costs of this application from opponent who will pay his own.

CIVIL REVISION PETITION NO 114 OF 1927.

BEFORE MR. S. J MURPHY, I. C. S.

Geela son of Chotu Carpenter of Kekri.

Plaintiff,—*Applicant:*

Versus.

Sukhdeo son of Chaganlal Mahajan Manager, Factory at Baghera (Kekri Circle). ... Defendant,—*Opposite party.*

S. 5 of the Limitation Act does not apply in Ajmer-Merwara to an application made for setting aside exparte decree and the Courts have no power to enlarge the time of 30 days fixed by Act 164 of that Act.

Jhawant Lal *for Appellant.*
Radhey Lal *for Opposite Party.*

ORDER.

The point is whether the learned Small Cause Court Judge Kekri has properly set aside an exparte decree, in view of the law of Limitation applicable to it

2. The decree was made on the 2nd May 1927 and an application to have it set aside was made on the 9th May 1927, but no sum was deposited, nor was security furnished. Security was furnished on the 23rd August 1927.

3. I have held in the case reported at 1 Ajmer-Merwara Law Journal page 15 that so long as the deposit or security required under section 17 of the Small Cause Court Act is furnished within time the application is in accordance with law. The time here was 30 days and though the month of June was the Annual vacation, in no view of the facts can the application here be considered as coming within time, under Article 164 of the Limitation Act.

4. The next point is as to the application of section 5 of the Limitation Act. I have been referred to several cases reported from Madras and to some from the Judicial Commissioner's Court, Nagpur in which the Madras cases have been followed: but in Madras, and presumably in the Central Provinces, section 5 has been made applicable by rules framed by the High Court. This is not the case in Ajmer-Merwara where there is no enactment here making them applicable.

5. It follows that the Small Cause Courts have no discretion to enlarge the time of 30 days allowable for such applications.

6. The Kekri Small Cause Court's order must there fore be set aside—I reverse it and dismiss the application restoring the exparte decree.

CIVIL REVISION APPLICATION NO. 114 A OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Sheonath Mohan Lal of Calcutta. ... Defendant, *Applicant.*

Versus.

Manna Lal Likhmi Chand through Panchu Lal son of Likhmichand Mahajan of Ajmer ... Plaintiff—*Opposite Party.*

(*a*) When a payment is made by money order the date of receipt and not the date of despatch is the date of payment.

(*b*) Payment by money order saves limitation under S. 20 of the Limitation Act because the presumption is that the M. O. form bears the remitter's signature as required by the Post Office.

Daya Shanker — *for Applicant.*
Ragu Nath .. . — *for Opposite Party.*

ORDER.

This was a Small Cause Court suit for the price of goods supplied to defendant. The goods were supplied between the 1st May and the 4th August 1923 and the last payment was made on the 28th November and 4th December 1923. The suit was filed on the 2nd December 1926.

The small Cause Court has found that the amount sued for was due and that the claim was within time.

The question really turns on the character and date of the last payment made. This was effected by money order which was received on the 4th December 1923.

I think the date of receipt is the date of payment and not the date of dispatch of the money order.

Under section 20 of the Limitation Act a part payment of principal evidenced in the hand of the debtor, or a payment towards interest as such, are sufficient to save limitation. As remarked by the trying Judge the presumption is that the money order form bore the remitter's signature for this is required by the post office. The original has not been produced but I think that the presumption can properly be made. Again the payment was partly for principal and partly for interest: it being accompanied by a letter stating that defendant was willing to pay so much, in full satisfaction of the claim part of which he disputed.

I think that section 20 of the Limitation Act covered the facts and extended limitation and that the claim was in time and the Small Cause Court's decree is correct.

I confirm it and dismiss this application with costs.

CIVIL REVISION PETITION NO. 115 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Bhanwari Lal alias Govind singh son of Kesri Mal Minor, through his next friend Madan Lal son of Lal Chand Khatri of Ajmer ... ... Defendant—*Applicant.*

Versus.

Firm Ghisa Lal Pokhar Mal through Ghisa Lal son of Gulzari Mal and Pokhar Mal son of Kanhiya Lal of Nasirabad—*Plaintiff.*

(2) Chand Mal son of Sua Lal Khatri, Diggi Bazar of Ajmer ... ... Defendant —*Opposite Party.*

(a) An award is intended to have finality but the better opinion seems to be that revision is admissible for the purpose of setting right the procedure and order of the Judge dealing with the objections. 36 Bom. 105 relied on.

Query—Does an agreement to refer to arbitration come within O. 37 R. 7. Madras, Bombay and Lahore High Courts say yes but the Allahabad H. C. says no.

H. C. Sogani ... ... *for Applicant.*

Daya Shanker ... . . . *for Opposite Party.*

ORDER.

A firm called Ghisa Lal Pokhar Mal by its two members sued a firm called Chand Mal Bhanwari Lal represented by Chand Mal *and Bhanwari Lal minor by his guardian to* recover Rs. 1,590/7/- alleged to be due on certain transactions between the two firms which took place between the 27th October 1922 and 5th March 1924.

A reference to arbitration was agreed to and seth Tara Chand *of Nasirabad was appointed arbitrator. He awarded the plaintiff* firm the sum claimed and a decree in the terms of award was made by the subordinate Court.

Bhanwari Lal by his next friend Govind Singh now challenges the legality of this award and in a companion application Chand Mal also does so.

I think Chand Mal's application must be dismissed. He has only raised two objections. One of these was not raised before the award was filed, and the other was disallowed. As far as Chand Mal was concerned there was perfectly valid reference to arbitration and there has been no irregularity. I dismiss his application No. 122 of 1927, with costs.

The point in the companion application is that Bhanwari Lal was a minor. An application under order 32 rule 3 was duly made for the appointment of his mother as guardian, but no

order was passed on it, nor were notices issued, neither when the application to refer was allowed, did the Court grant its leave to the agreement to refer in his case.

It is the duty of the Court to see that a minor defendant is properly represented, and that his interest are duly safe guarded and in this case this duty has not been carefully carried out by the learned Sub Judge.

There is a conflict of decision on the point whether an agreement to refer to arbitration comes within Order 32 Rule 7. In Madras, Bombay and the Punjab it has been held that it does. The Allahabad High Court has held that it does not.

As to the defect of representation whether it is fatal to the agreement to refer or not, would depend on whether the minor was 'substantially' represnted in the suit and the leading case is that of Walian Versus Banke Behari reported in I. L. R. 30 Calcutta 1021.

In this case the mother of the minor was described as in this as his guardian and it was held that he had been sufficiently represented. The answer to the question really depends on whether the defect in procedure has prejudiced the minor or not. The minor's mother was represented by a 'Mukhtyar' and both the award and the learned Sub Judge's order comment on the fact that the defence case was never properly put forward though they ascribe this to a deliberate evasion by defendants. The case of Chand Mal defendant was opposed to that of the minor since he pleaded that he was not a partner in the firm which had been sued.

On the whole I am not satisfied that the minor has been properly represented and has not been prejudiced.

There remains the question whether the Court can interfere in revision or not. An award is intended to have finality but the better opinion seems to be that revision is admissible for the

purpose of setting right the procedure and order of the Judge dealing with the objections I. L. R. 36 Bombay page 105.

In this case the learned sub Judge's procedure was wrong on two points before the award was made and I therefore think the reference was bad. I can not separate the award as against Chand Mal from that against the minor.

I therefore set aside all the proceedings of the original Court to the point where an application to refer was made to him and he should therefore appoint a proper guardian ad-litem for the minor and if a fresh application to refer is made give his leave or not on behalf of the minor and if not, himself dispose ofs the suit according to law. Applicant to have his costs of thi application from respondent firm which will pay its own.

CIVIL SECOND APPEAL NO. 41 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Bhawani Ram and Ghewar Chand sons of Birdhi Chand Tailors of Beawar ... Plaintiffs—Respondents—*Appellants.*

Versus.

Devi Chand son of Ganga Ram, Santokchand son of Gad Mal Oswals of Beawar ... Defendants, Appellants—*Respondents.*

(a) In cases of private nuisance the test always is, ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes of living, but according to plain and sober and simple notions.

(b) In case of a privy the real question always is whether the defendant has a right for his own purposes to put up such a convenience

in that place despite any discomfort it may cause to the plaintiff's occupation of his own premises. It is no defence to such an action that the place where the nuisance is created is the only place suitable for the purpose; or that all reasonable care and skill has been taken to prevent it by obtaining Municipal Committee's permission and fulfilling all its engineering and health requirements, or that the defendant is really making a reasonable use of his own property or that there are numerous other and similar arrangements in the same street.

Suraj Karan .. .. *Appellants.*
Ghisoo Lal ... ... *Respondents.*

JUDGMENT.

This dispute relates to a latrine. The parties own adjacent houses and the defendant has built a latrine in his, against the wall of the plaintiffs sitting or work room. The building was erected with the permission of the Beawar Municipality and is in conformity with that body's engineering and health requirements but the plaintiff complained that in spite of these precautions the use of the latrine in such close proximity to his sitting room amounts to a private and actionable nuisance which the Court should relieve against. The original Court found on the evidence that the plaintiff's case was made out and gave the injunction prayed for. In first appeal the Additional District Judge reversed this decree and dismissed plaintiff's suit on the ground that he lacked the necessary spirit of give and take, that privies were a necessity, that this one was as suitably situated as any other, and that people who elect to live in towns like Beawar, must put up with the consequent inconveniences of life in them.

This may amount to consolation for the plaintiff but I do not think it is a correct view of the law as to private nuisances. It is clear that the plaintiff has so far enjoyed the amenities of his dwelling free from the drawback of a privy situated adjacent to his shop and sitting room and the real question is whether the defendant has a right for his own purpose to put up such a convenience in that place despite any discomfort it may cause to

the plaintiff's occupation of his own premises. It is no defence to such an action that the place where the nuisance is created, is the only place suitable for the purpose: or that all reasonable care and skill are taken to prevent it, or that the defendant is merely making a reasonable use of his property. This is an action for personal discomfort caused to the plaintiff and in such cases the decree of discomfort which constitutes a nuisance has been defined by Vice Chancellor Knight Bruce in Walter Versus Selfe and is quoted in Ratan Lal and Dhiraj Lal's law of Torts.

> "Both on principle and authority the important point for decision may be thus put-ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty modes of living, but according to plain and sober and simple notions."

The facts really are that the house adjoining plaintiffs on that side had a privy *some distances away. Half of this house was* sold to defendant and he then proceeded to build a new convenience adjacent to plaintiff's house. There may be numerous other and similar arrangements in the same street but there is no doubt on the evidence that this one constitutes a new and additional nuisance to the plaintiff which defendant has no right to subject him to on general principles. The medical and other evidence shows that it is not a mere question of a fanciful and fastidious grievance but a real one such as almost any inhabitant of a town can reasonably object to. There may be numerous other similar arrangements but I think defendant has no right to put up a new one to plaintiffs discomfort.

I reverse the first appellate Court's decree and restore that of the original Court. Appellant to have his costs of this and the first appeal from respondent who will pay his own.

CIVIL APPEAL NO. 46 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Musammat Amna Bibi widow of the deceased on her own account and on account of her minor sons.

Applicant—*Appellant.*

Versus.

Hafiz Mohammed Bux ... ... *Objector, Respondent.*

(*a*) Even where no Letters of Administration have been actually issued a Court has power under S. 302 of the Indian Succession Act to pass any order it thinks necessary for providing for the immediate necessities of the deceased's family, so that they may not be compelled to borrow for their maintenance at exorbitant rates.

(*b*) When an application for Letters of Administration discloses sufficient right to administer, though if another question were decided *adversely to applicant there might technically be no assets of the* deceased to be administered, yet it is not for the Court to decide these questions and administration should be granted on pleadings.

(*c*) A sole administrator is preferable to joint administrators, a male to a female and one who is accustomed to business to one who is not.

Ghisoo Lal ... ... *Appellant.*

Mithan Lal ... ... *Respondent.*

ORDER.

The facts admitted are that the estate left by the applicant's late husband is worth about 4 lacks of rupees in British India and unstated amount in Alwar state, where deceased was a contractor. An order has been made by the District Court directing letters of administration to issue to opponent, though these have not as yet issued, owing to certain preliminary formali-

ties. Meanwhile an appeal against that order has been lodged in this court.

Opponent is in possession of a certain portion of the estate, and applicant in occupation of a house belonging to it in Ajmer. Applicant seeks an order granting her Rs. 200/- P. M. for her maintenance pending the end of the litigation which is going on. Opponents' pleader urges that his client has sent various money orders for varying amounts up to Rs. 100/- and that these have been refused and the otherside explains that they were refused as the dribbling out of small sums was intended as an insult. It is evident that there is ill feeling between the parties.

The application purports to have been made under section 302 of the Indian Succession Act. It is argued that under that section especially in view of the fact that no letters of administration have so far actually been issued, I have no power to make an order.

I do not think the fact that letters have not so far been actually issued affects the jurisdiction of the Court: and it is obviously to the interest of the estate that the immediate necessities of deceased's family should be provided for and that they should not be compelled to borrow for their maintenance at exorbitant rates. I believe section 302 covers a case of this kind, and direct the administrator opponent to pay Rs. 200/- P. M. which I consider a reasonable sum, looking to the size of the estate, for the maintenance of deceased's wife and four younger children. The payments should be made from the 1st of this month: and regularly on the 1st of the month in future.

I will hear the appeal against the District Court's order at the next Session of this Court in November or December.

FINAL ORDER.

The late Khan Sahib Allah Bux died at Ajmer on the 25th April 1926 leaving him surviving so far as this application

involved, a widow, the appellant, three sons and two daughters. He left a large estate partly in British India and partly in the Alwar State where he has been a contractor.

One of the sons, the opponent, is of full age. He applied for letters of Administration to the estate on the grounds that:—

> "3. That the petitioner is eldest son of the deceased and has been appointed Mutwali by the Wakaf-nama dated the 25th April 1926 and as such is entitled to administer the property left by the deceased."

The "Wakafnama" was in the case of this application irrelevant and could not have been gone into: but the application did state that there was property of the deceased to be administered and the ground on which the applicant based his claim as the eldest son of the deceased.

The application was therefore within the terms of Section 218 of the Indian Succession Act 1925.

Musammat Amna Bibi and some others entered caveats against the grant of administration and Musammat Amna Bibi also made a separate application for a grant to herself.

On these proceedings there were three courses open to the learned Additional District Judge. These were, to grant letters of Administration either to Mohamed Bux, or to Musammat Amna Bibi, or for good reason shown, to refuse the grant under Section 298 of the Act. But what happened was that owing to the confusion of the issues introduced by the mention of the Wakafnama, Mohamed Bux's application was dismissed while in that of Musammat Amna Bibi he was granted what had been refused him in his own application.

The position of a Probate and Administration Court in a case in which letters of administration are sought, while the grant is opposed on a ground of paramount title, which if made out would leave no property to be administered, is discussed at great

length in the case reported in 54 Indian Cases at page 807 which has been quoted in one of the orders made by the Court below.

After discussing the three leading cases the District Judge came to the conclusion that, where there is property left by an intestate and the applicant is one of the persons who would ordinarily be entitled to letters of administration, it is not for the court sitting as an administration court to go into the question whether if certain facts were proved there would be any property to administer, or not. The cases in question turned on the rights of inheritance of Hindu widows depending on whether their husbands had been separated from or joint with other members of the family. The principle is, that where the application discloses sufficient right to administer, though if another question were decided adversely to applicant there might technically be no assets of the deceased to be administered, yet it is not for the Court to decide these questions and administration should be granted on the pleadings and the reason has been stated by Sir Lawrence Jenkins Chief Justice in the case quoted by Mr. Justice Das:—

> "the grant in no way limits or prejudices the caveator for it is general in its terms specifying no item of property, and prejudging nothing to the detriment of the appellant. It has been suggested that a grant of letters might involve peril to the appellant's interest but this is not so as on the grant of letters adequate security is taken."

The obvious course in this case was to hear the applications together and to decide between the contending parties and appoint the best qualified to be the administrator leaving aside altogether the disputed question of the "Wakafnama" which was not necessary to be decided and could not be gone into in these proceedings.

Such a course was clearly justified for the pleadings in each

case showed sufficient grounds for a grant to one or other of the applicants quite apart from the "Wakfnama" which had been quite unnecessarily dragged in.

Had this been done the difficulty and illogicality which now confronts me would have been avoided for Hafiz Mohamed Bux's application has been dismissed: while in the companion one in which he was an objector it has been allowed, the grounds on which it was disallowed in the first being brushed aside.

Mr. Bapat for appellant contends that the grant is "incompetent and unprincipled" and he suggests that the test is:—

> "Whether the property sought to be administered belonged to the intestate at the time of his death and whether the grant to Mohamed Bux is warranted by the guiding principle of the Act and whether Mohammed Bux's interest in the property was such as would attract the grant of letters to him."

But on the view I take of the law and the decided cases I do not think any of these very general considerations really arise at all.

Both sides alleged in their pleadings that deceased died intestate leaving a considerable estate and the question whether he had before his death divested himself of this estate, or not, technically, was not one which the Court could consider in this proceeding. The facts clearly called for the grant of letters of administration to someone, even though they maynot have been strictly a necessity for the administration, and it is for the Court to appoint an administrator. Courts in exercising their discretion in such cases have been guided by the principles that a sole administrator is preferable to joint administrators, a male to a female, one who is accustomed to business to one who is not, and so on. I think nothing serious has been proved in this case against Hafiz Mohammed Bux to disqualify him in preference to his step-mother. He is of age and an educated man accustomed

to business and his interests are not really adverse to those of the family though there is special settlement. in the "Wakafnama" in his favour which may or may not ultimately be upheld in the suit which I am told has been filed to challenge that document. Musammat Amna Bibi on the other hand is a "purdanashin" woman whose administration would have to be through others and who has not the same facilities for and knowledge for conducting business as Hafiz Mohamed Bux. I therefore think that it is in the interest of the family as a whole to grant the letters of administration to Hafiz Mohamed Bux in spite of the difficulties caused by the order dismissing his application.

I confirm the District Court's order and dismiss this appeal.

No order as to costs.

CIVIL SECOND APPEAL NO: 57 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Master Rafiuddin son of Shamshuddin Mohamedan of Beawar, Original. ... Plaintiff Respondent—*Present Appellant.*

Versus.

Karim Bux died represented by Mohammed Umar, (2) Ramzan Bux and, (3) Abdul Rahim sons of Karim Bux Musalmans of Beawar, Original ... ... Defendant No. 2, Appellant—*Present Respondent.*

and

(2) Abdul Ghafur son of Shamshuddin Mahomedan of Beawar, Original ... ... Defendant No. 1., Respondent (and Objector) *Present Respondent.*



and held the plaintiff's share of one third of the property in that capacity. The usual presumption is that in such a case when no partition has taken place the sole occupation by one co-sharer is not prima facie inconsistent, with right of the others-that the exclusive occupation and enjoyment of the property by one is not per se adverse possession, and that in addition there should be an open assestion of a hostile title and notice thereof to the others direct or to be inferred from notorious acts and circumstances. But this general rule applies to actual co-sharers.

Badruddin was actually an alienee from the other two co-sharers and in such a case the presumption is that the alienees possession is adverse forthwith provided that the alienation takes place in circumstances which would affect the other co-sharer with notice. Had plaintiff been a major at the time of the sale there is no doubt this presumption would have been good against him. But since he was a minor the question is from what point can Badruddin's possession be held to have become adverse to him. Had plaintiff brought the suit within three years of his attaining majority there could have been no question that it would have been within time, but he did not.

In the circumstances of this case I think that Badruddin's purchase and taking possession did amount to the setting up of an adverse title to the plaintiff and that since his adverse possession extended over more than twelve years he acquired a title by prescription which the plaintiff could only challenge within three years of his attaining majority. Since the suit was not brought within that time it is from this point of view barred by limitation. This disposes of three of Mr. Raghu Nath's points.

The other view is as to the effect of the mortgage. Unfortunately the original Court has not observed the correct procedure in this matter.

The plaintiff called on the defendant representing the purchase to produce the original documents which had been returned by the mortgagee but he failed to produce them.

The plaintiff then tendered certified copies of the mortgages but they never seem to have been produced by a witness, or proved in any way and this was necessary neither were the provisions of order 13 Rule 4 which are imperative observed.

On an application to him on the point the learned Additional District Judge refused to proceed further in the matter and he has not considered them in his judgment.

Since however the omission is due to the usual lax practice of the courts in this district, and that it is the trying Judge and not plaintiff who is responsible for it, I will consider the case from this point of view. It is that of one co-mortgagor redeeming the whole property and of a suit against him by the other co-mortgagor. I may as well begin stating that this is not the frame of the suit and I am very doubtful if on the pleadings such a contention can be raised. But has the suit been so framed the position of Badruddin and of his successor in interest would not be that of a mortgagee (within Article 148) for he would have merely a charge and not a mortgage on the plaintiff's share and the proper article to apply would be 144.

This being so even on this view of the case plaintiffs must fail on the point of limitation for adverse possession would begin to run against him as it does on his suit as framed and he should have come to court within three years of his attaining majority.

I therefore confirm the Lower Appellate Court's decree and dismiss this appeal with costs.

CIVIL SECOND APPEAL NO. 65 OF 1927.

BEFORE MR. S. J. MURPHY, I. C. S.

Dhanna Lal son of Gambhir Mal Saraogi of Ajmer
Defendant—*Appellant.*

Versus.

Ratan Lal son of Kanak Mal Saraogi of Ajmer
Plaintiff—*Respondent.*

and

(2) Musammat Jarao widow of Phul Chand Saraogi of Ajmer ... ... Defendant, Proforma—*Respondent.*

(*a*) The general rule among Jains is that in the absence of a custom to the contrary, the rules of Hindu law apply to them in matters of inheritance and adoption. 16 Bom. 347 and 22 Bom. 416 relied on.

(*b*) Amongst Jains a sonless widow has the same power of adoption as her husband would have had if he had chosen to exercise it—neither his sanction, nor that of any other person is necessary. 8 All. 319, 17 Cal. 518 and 30 All. 197 foll.

(*c*) Among Jains a person can be adopted till 32 and probably there is no limit of age.

(*d*) It also seems likely that among Jains, as is the settled rule in the Punjab, no adoption ceremonial whatever is required, the transaction being purely a matter of Civil contract, but there is no decided case on this point for Ajmer-Merwara.

(*e*) The doctrine of factum valet applies to an adoption only when the adoption was valid apart from the lack of observance of a ceremonial necessity.

(*f*) The rule of Hindu law that an orphan cannot be adopted is in the absence of custom, universal and applies to Jains and Hindus alike.

(*g*) Obiter—A mere receipt of mortgage-money does not require registration.

Raghu Nath and M. L. Capoor ... ... *for Appellant.*
Bishamber Nath, R. S. and B. N. Tandon ... *for Respondent.*

JUDGMENT.

Appellant sued:—

(1) For a declaration that a house in suit belonged to him,

(2) For cancellation of what is called a receipt dated 24th August, and,

(3) for an injunction restraining defendants from interfering with the property.

The basic facts on which his suit was based were as follows:—

The property in question had been mortgaged by the original owner *to one Musammat Jarao. The mortgagor's equity of* redemption was brought to sale in the course of some other legal proceedings, and was sold to Dhanna Lal, who was given possession through the Court.

This sale took place on 7th November 1921. After all this, Musammat Jaora is said to have made a will in plaintiffs wife's favour *on 9th March 1922 : to* have adopted the plaintiff as a son to her deceased husband on 30th June 1922 : and lastly to have given a receipt of the sum secured by her mortgage on the 24th August 1922.

Plaintiff's real case was that, on his adoption he became the owner of the property which had vested in Musammat Jarao as widow *of the last male owner, and that as she had been the real* purchaser at the auction sale of the equity of redemption, she had become the owner of the property, which on his adoption vested in him, and that her acknowledgment of receipt of the mortgage amount was sham.

The issue most strenuously fought out has been the plaintiff's right to maintain the suit, it being denied that his alleged adoption was valid.

The original Court found that plaintiff was not the adopted son of Phul Chand: and that his adoption was not valid. That the sale to Dhanna Lal was not benami for Musammat Jarao: that the mortgage amount had been paid to Musammat Jarao, and that plaintiff could not maintain a suit on his allegations and was not entitled to any relief.

The first Appellate Court held that the plaintiff's adoption was valid in law: that Dhanna Lal purchased the equity of redemption benami for Musammat Jarao: that the alleged payment of the mortgage amount was fictitious, that Musammat Jarao could not receive it.

The original court's decree was reversed and the suit was decreed.

The issues in appeal are :—

(1) Can the adoption of plaintiff be held to be valid in the absence of proof of a custom by which the adoption of a married man and an orphan is valid?

(2) Can the purchase of the property at the auction sale by Dhanna Lal be considered benami in the absence of proof that he brought on behalf of and for the benefit of Musammat Jarao?

(3) In view of the provision of section 66 of the Civil Procedure Code can plaintiff be allowed to sue for a declaration that the purchase by Dhanna Lal was benami for Musammat Jarao?

I find on these issues :—

(1) It can not be held to have been a valid adoption: as plaintiff had at the time no parents living.

(2) It can not, and was not benami for Musammat Jarao.

(3) In view of section 66 of the Civil Procedure Code plaintiff can not maintain this suit.

The parties are Jains and the general rule among them is

that in the absence of a custom to the contrary, the rules of Hindu Law apply to them in matters of inheritance and adoption.

I. L. R. 16 Bombay page 347.
I. L. R. 22 Bombay Page 416.

In this case there is no allegation that the widow had the authority from her deceased husband to adopt, and, the plaintiff when he was adopted was 33 years old, had lost both his parents: and was married and had children.

It has been held that among the Jains a sonless widow has the same power of adoption as her husband would have had if he had chosen to exercise it, neither his sanction, nor that of any other person, is necessary (8 Allahabad 319, 17 Calcutta 518; 30 Allahabad 197) this is also the general rule in Western India and I assume that Musammat Jarno could adopt a son.

The only remaining question is whether or not she could validy adopt the plaintiff.

The general rule of Hindu Law is that only parents can give in adoption and a man having none alive cannot be adopted. This is plaintiff's position. His age is 33, but it has been held that among Jains a person can be adopted certainly till 32, and probably that there is no limit of age. It also seems likely as is the established rule among Jains in the Punjab, that no ceremonial whatever is required, the transaction being purely a matter of Civil contract, but there is no decided case on this point for Ajmer-Merwara. The doctrine of factum valet would of course apply, where the adoption was valid, apart from the lack of observance of a ceremonial necessity only.

The only point therefore on which the plaintiff's adoption can be attacked is that of his condition as an orphan: having neither parents alive. This rule of Hindu Law is, in the absence of custom universal, and plaintiff has made no attempt to prove any custom: in fact the point is shoved over in the plaint.

and both the temporal and frontal bones of his head were fractured as well as the great wing of the sphenoid and the base of the skull.

Though I do not suppose that in the circum stances Megh Singh's life could have been saved by prompter medical assistance his treatment was very unfortunate. He was left lying where he had been assaulted till day-break and then helped or carried to a cart and taken to the village. On the following day the 12th October, he was again placed in a cart and taken to Srinagar Police Station. There too Head Constable in charge apparently entered the case in the non-cognizable register and sent the victim to the Hospital at Ajmer. Megh Singh however died before reaching Ajmer.

Karim Bux Imam Bux the Head Constable in charge at Srinagar states that Megh Singh appeared to be much injured, yet he did nothing in the matter till 14th October, when on hearing he had died he registered the case and started an investigation, this delay the only object of which could have been avoiding an entry in the cognizable case register, has enormously increased the difficulties of the case. I draw the District Magistrate's attention to it.

The facts according to the Crown are that deceased and his servant Manghi Lal went to the field in question in order to sow some gram and spent the night there. One Har Lal Kumbhar who had been worksng also did the same.

About 4 A. M. Har Lal arose and took the bullocks they had with them to graze in a millet field of deceased's. On this the two accused came from their field and attacked deceased with their 'Lathies'. Har lal raised a cry and ran away and Manghi Lal being aroused came up and saw secused driving away the bullocks.

Har Lal and Manghi Lal did nothing till dawn when they went and looked at deceased and then helped him up and ultimately to the case which took him to the village.

If Har Lal and Manghi Lal are to be believed there can be no doubt of accused's guilt, But the witnesses are not only discrepant as between the different statements that each has made at different times; but also as to the account which each gives as to what happened at the time. These difficulties are set out in the learned Additional Sessions Judge's judgment paras 14 and 15.

The learned Additional Sessions Judge has also considered the theory that Har Lal and Manghi Lal were not with Megh Singh at all when he was beaten but that walking up and finding him missing in the morning they looked about and discovered him lying unconscious and took him to the cart. He has how-ever rejected this theory on the ground that this involved the falsehood of the whole of the testimony of these two men which had this been the case would naturally have been more carefully prepared and therefore more consistent than it now is. Also because he can discover no motive for their being false witnesses.

The only other evidence inculpating the accused is the statement of witness Ram Das who speaks of an extra judicial confession by the accused that they had been beating Meg Singh and thrown him to the ground. This testimony is not at all convincing.

It is true that as a general rule a sign of truth where several witnesses testify on the same point is their agreement as to all material facts with discrepancies between them on minor points: and also that concocted evidence can sometimes be detected by the fact that it is all too consistent and lacks the small variations to be found in average evidence and which are doe to varying powers of observation and memory of different angles of view and also that some allowance must be made for rusticity. But in this cace the testimony of the two eye witnesses is not only thoroughly discrepant and full of contradictions bnt it also describes conduct on their part which is in itself very improbable.

It does not seem to me to be at all likely that even if they were afraid to interfere at the time they would not after the assailants had left, have gone to the village to report the matter. The fact according to deceased's brother is that he heard of the assault in the village before he went to the field. I cannot believe that these two men left Megh Singh lying where he had fallen and *returned* to the cart and went to sleep and the fact seems to me to fit in with the theory advanced and rejected by the learned Additional Sessions Judge, that these witnesses knew nothing of the assault till they found Megh Singh lying there wounded next morning. The consideration that if this was so they should have told a more consistent tale is not really of any great weight for this would depend on their ability and intelligence.

On a careful consideration of all the evidence I am unable to agree with the Sessions Judge that these men have told the truth and that the case has been proved against the accused. I reverse the convictions recorded against and sentences passed upon the appellants and direct that they be acquitted and discharged.

CIVIL REVISION APPLICATION NO. 125 OF 1927.

BEFORE MR. S. J. MURPHY, I.C.S.

Balaram Caste Mahajan of Marwar ... Defendant—*Applicant.*

Versus.

Firm Mool Chand Ram Narain through Paras Ram
Plaintiff—*Opposite Party.*

(a) In the case of a defendant who is a resident of a Native State the natural presumption is that he has spent his time outside British India and very little evidence on the part of a plaintiff will suffice to obtain the benefit of S. 13 of the Limitation Act.

Daya Shanker ... ... *for Appellant.*
Raghu Nath and M. L. Capoor ... ... *for Respondents.*

ORDER.

The only point arising in this application is whether the suit was within time, as allowed by Section 13 of the Limitation Act. The amount decreed is unquestionably due but Mr. Daya Shanker's argument is that plaintiff should have been put to strict proof that defendant had been absent from British India for the necessary period. I have read all the evidence. Defendant is an inhabitant of the Marwar State and habitually resides there where he has a business and also at Calcutta where he seems to have a branch of his firm or a second business. He has led evidence to show that he has paid frequent visits to Ajmer since the amounts became due. But he has not himself entered into the witness box to support his witnesses. The plaintiff's evidence too it is true vague, but I do not agree that in a case like this where the defendant habitually resides out of British India it lies heavily on the plaintiff to prove his absence—The natural presumption is that defendant has spent his time out side British India and very little evidence for plaintiff will suffice to establish it and it then lies on defendant to rebute it.

I think the learned Sub Judge has taken the correct view. I confirm his decree and dismiss this application with costs.

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Vol. IV. Part II.

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AND

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Miscellaneous Civil Petition No. 10 of 1928.

BEFORE MR. S. J. MURPHY, I. C. S.

Behari Lal son of Baldeo, Brahmin of Ajmer *Applicant.*

Versus

The District Nazir of Ajmer *Opposite Party.*

Auction sale - Duration-Remuneration of Nazir in uncompleted sales

(*a*) The Civil Procedure Code does not lay down that a court sale should continue for 7 days.

(*b*) The rules do not provide for payment of any remuneration to the Nazir when the sale has not been completed

(*c*) A stay of a Court sale should be granted conditioned on deposit of Nazir's commission in court

Date of Judgment 22nd March 1928.

Counsels --Mr. Prabhu Dayal for *Applicant.*

and Messrs. Ghisoo Lal and Jasoda Nandan for *Opposite party.*

Subject matter of the case

Application for the revision of the order of the Sub-Judge First Class, Ajmer, dated the 13th October 1927 in suit No. 142 of 1927

Judgment.—The point in this Civil application relates to the question of the remuneration to which the District Nazir is entitled where an auction sale is ordered and takes place in part, but is stayed before the property is knocked down. The rules only provide for a percentage to be charged and to be recovered out of the proceeds of the sale

They do not say what shall be done when no sale takes place though the property is put up to sale

In this case the property was put up to sale under decree No. 567 of 1924 in January 1924 and an auction was held the highest bid being Rs 1,000 But the matter was

compromised and the judgment-debtor was ordered to pay the Nazir Rs. 30/-.

The second sale, the one I am now concerned with, was in execution application No. 142 of 1927.

The auction began on 11th July 1927 and was continued till 13th July 1927, on which date the executing Court ordered an adjournment till further orders. As the last bid was Rs. 900/- the judgment debtor was ordered to pay commission on this amount to the Nazir.

I find that the matter is not *resintegra*. Mr. Ashworth a learned predecesor of mine, had the point before him and his view was that since the rules do not provide for the Nazir's remuneration when no sale takes place, a stay should only be given on condition that whoever seeks it pays into Court the amount of the Nazir's commission and this of course can always be done. But it does not appear to have been done in this case.

Another factor which seems to complicate matters is I am told that auction sales in Ajmer-Merwara invariably continue for 7 days, being held for a short time at 8 a. m., on successional mornings and being concluded on the 7th day. But this is not the practice prescribed by the Civil Procedure Code which lays down (Order 21 Rule 66) that the time and place of the sale shall be specified in the proclamation, meaning thereby that there shall be one time and not 7: and the 7 day idea seems to have been derived from Rule 69 of Order 21 though the practice in Ajmer is not its meaning.

Be this as it may, it seems to [illegible] lear that under the rules as framed, the [illegible] has no p[illegible] to order anything as remuneration t[illegible] to the [illegible] where there are no proceeds out of [illegible] y him [illegible] the secure payment in such ca[illegible] here mu[illegible] r of staying conditional on s[illegible] being m[illegible]

In this case there is no such order, to Rs. 150/- to be deposited being intended for the creditor.

The learned Sub Judge's order therefore directing to judgment-creditor to pay the Nazir's fees which was made later, can not be supported. I set it aside and make no order as to costs.

Application accepted.

Civil Revision Application No. 51 of 1928.

BEFORE MR. R. S. BROOMFIELD, I. C. S.

Khadims of Durgah Khwaja Sahib through syed Altaf Hussain, Sayed Zahurul Hussian and others. *Petitioners.*

Versus.

Dewan Syed Aley Rasul Khan, Sajada Nashin Durgah Khwaja Sahib. *Opposite Party.*

Civil Procedure Code Section 115-Scope-Interlocutory orders. Amendment of pleadings.

(a) When a court has jurisdiction to decide a point it can decide it rightly or wrongly and no revision lies on the ground that the decision is erroneous.

48 M. L. J. 349 dissented from

45 All 425 Foll.

(b) When there is a conflict of opinion on a point amongst the various High Courts the Allahabad High Court view will generally be preferred but not always and necessarily.

(c) Even an interlocutory order can be revised in a proper case when it is necessary to prevent grave hardship or injustice.

(d) Refusal to allow an amendment of the pleadings is not open to revision—Judgment in Civil Revision Application No. 57 of 1928. Not approved.

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Be this as it may, it seems to be clear that under the rules as framed, the Court has no power to order anything as remuneration to be paid to the Nazir where there are no proceeds out of which to pay him and that the secure payment in such cases legally there must be an order of staying conditional on such payment being made.

In this case there is no such order, to Rs. 150/- to be deposited being intended for the creditor.

The learned Sub Judge's order therefore directing to judgment-creditor to pay the Nazir's fees which was made later, can not be supported. I set it aside and make no order as to costs.

Application accepted.

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(b) When there is a conflict of opinion on a point amongst the various High Courts the Allahabad High Court view will generally be preferred but not always and necessarily

(c) Even an interlocutory order can be revised in a proper case when it is necessary to prevent grave hardship or injustice.

(d) Refusal to allow an amendment of the pleadings is not open to revision--Judgment in Civil Revision Application No. 57 of 1928. Not approved.

1 A. M. L J. 1, 7 and 29, 2 A. M. L. J. 17 Relied upon.

(e) The remedy under section 115 Civil Procedure Code is not intended to be an economical substitute for an appeal.

Date of judgment 19th July 1928.

Counsels.—Mr Ghisoo Lal for *Applicant.*

Subject matter of the case.

Application for revision of the order of the Sub-Judge First Class, Ajmer, passed on the 5th September 1927, in case No. 37 of 1926.

Order.—The petitioners, who are defendents in a suit in the Court of the First Class Sub Judge, Ajmer, applied to to the Judge to be allowed to make certain amendments to their written statement The Judge considered the application and rejected it in a reasoned order. Against this order the present revision application has been brought.

On the face of it the application is incompetent on the ground that no question of jurisdiction is involved. I need only refer to the well-known judgments of the Privy Council in Amir Hussan khan Versus Sheo Baksh, 11 Calcutta 6, and Balakrishna Versus Vasudeva, 40 Madras 793. According to what appears to me the most natural and reasonable interpretation of these rulings the present application is clearly barred. The Sub Judge had jurisdiction to decide whether the amendment of the pleadings should be allowed or not; he did decide the matter; and he can not be regarded as having acted *in the exercise of his jurisdiction* illegally or with material irregularity, merely because his decision is, or is alleged to be, erroneous. As I understand the matter, the question of jurisdiction does not arise at all.

No doubt, as is pointed out in Mulla's Commentary on Section 115, there have been different applications of the rules laid down by the Privy Council by different High Court; and the learned council for the petitioners has quoted a case of

the Madras High Court, Kariya Versus Tirukkaively, 48 Madras Law Journal 349 in which an order refusing an application for the amendment of a plaint was set aside in revision. The case is not as good an authority in favour of the learned counsel's contention as it would otherwise have been, because the only question discussed in the judgment was whether the Court ought to interfere in revision with an interlocutory order The Court did not consider, or any rate did not explain, how an order refusing an amendment of pleadings could be brought within clauses (a), (b) or (c) of Section 115. But, apart from that, where there is a difference of opinion between the Madras High Court and the Allahabad High Court, as there is on the point in question (see Yad Ram Versus Sunder Singh, 45 Allahabad 425), there is no reason why this Court should follow the Madras view rather than the Allahabad view. On the contrary, indeed, the petitioner's learned counsel frankly admitted that, having regard to the close association between Ajmer-Merwara and the Allahabad High Court until very recent times, it would be more appropriate to prefer the view of that High Court.

As regards the other point which arises, namely that the order sought to be revised is an interlocutory order, if I were to follow the Allahabad High Court (see Buddhu Lal Versus Mewa Ram, 43 Allahabad 564) I should have to hold this to be an additional ground for rejecting the application. But that is a question as to which there has been a great conflict of authority, and the majority of the High Court now hold that an interlocutory order can legally be revised under Section 115, though they also hold that the discretion to interfere in such cases should only be exercised in very exceptional cases, when it is necessary to prevent grave hardship or injustice. My own view, I say with all respect, is in favour of the latter interpretation of the words "case decided" in section 115, and as this Court is no longer necessarily bound to follow the view prevalent in Allahabad,

as against that prevailing elsewere, I do not consider that there is anything to prevent me from interfering in revision with an interlocutory order, *in a proper case.* The maxim "*boni judicis est ampliare jurisdictionem* seems to me to apply here; for cases may, and do occasionally occur, where very serious hardship may be caused if the Court will not under any circumstances interfere with such an order. In the present case, however, I should not interfere because (apart from the fact and that the application is otherwise incompetent, as I have explained) I can see no special circumstances which make it necessary to interfere at this stage. The mere fact that the petitioners may be put to some trouble, delay and expense if they have to appeal is not in my opinion a sufficient reason. That argument could always be put forward and this much at any rate is perfectly clear about Section115, namely that it is not intended to be made use of simply as an economical substitute for an appeal.

The learned counsel for the petitioners has urged, not very confidently, that the practice of this Court has been to allow revision in cases of this kind; and he has referred me to a judgment of Mr. Barlee's in civil Revision Application No. 57 of 1926. But that judgment, in which there is no discussion of the scope of Section 115 whatever, has certainly not settled the practice of the Court. For that we should rather look at Judgment like those of Mr. Murphy reported in the Ajmer-Merwara Law Journal I page 1 and page 7, and those of Mr. Baker reported in the Journal I page 29 and II page 17., I find nothing in these Judgments inconsistent with the views I have expressed here; nothing at any rate which could be of any service to the present petitioners.

The application is summarily dismissed.

Civil Second Appeal No. 3 of 1928.

BEFORE MR. R. S. BROOMFIELD, I. C. S.

Bakshi Ram son of Jora Jat of Kanpura, Judgment-Debtor, *Appellant.*

Versus

Kundan Mal son of Jumna Lal, Mahajan Saraogi of Bir Decree-Holder, *Respondent.*

Limitation Act section 5. Appeal. Time spent in prosecuting Review application, Extension of.

(a) The time spent in prosecuting with due diligence a bonafide and proper application for review should be deducted and the appeal ought to be admitted under Section 5 of the Limitation Act

45 Cal 94 P C. and

A. I R. 1927 Bom. 221 Foll

(b) If the court issues a notice to the other side it is a sufficient test of the bonafide nature of the review application.

Date of judgment 2nd August 192[illegible]

Counsels:—Mr. Ganga Persad Dube for *Appellant*
and Mr. Nand Lal for *Respondent.*

Subject matter of the case.

Appeal under Section 47 and Section 100 Civil Procedure Code against the order of the Additional District Judge, Ajmer, dated the 19th November 1927, in miscellaneous Civil Appeal No. 40 of 1927.

Order.—The only point in this appeal is one of limitation. An order was made against the appellant by the First Class Sub Judge, Ajmer, on 13 8 1927. The period of limitation for

an appeal under the Ajmer Courts Regulation Section 15 (b) is 60 days from the date of the order. The appeal to the District Judge ought to have been filed, therefore, on or before 10-10-1927, or after excluding five days which were required for obtaining a copy of the order appealed against on or before 15-10-1927. It was actually filed on 19-10-1927, and the learned Additional District Judge rejected it as time barred.

On 30-8-1927 the appellant made an application for review of the Sub Judge's order and those proceedings lasted till 13-10-1927, when a review was refused. It is contended in this second appeal that, in view of the time taken in proceeding the review application, the delay of a few days in filing the appeal ought to have been excused under Section 5 of the Limitation Act.

In my opinion this contention is sound. There is the best possible authority for it in the Privy Council case of Brij Indar Versus Kanshi Ram, 45 Calcutta 94, where it was held that the true guide for the exercise of the discretion allowed by Section 5 is "whether the appellant has acted with reasonable diligence in the prosecution of his appeal", and that "he ought to be deemed to have so acted where, after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the decree appealed from and the date of presenting the appeal does not exceed the period." In this case the review proceeding lasted 45 days, so that the appeal was very easily within time if the time taken by those proceedings be deducted.

No doubt, as has been pointed out in A.I.R. 1927 Bombay page 221, it is necesary that the review proceedings should be *bona fide* and proper. But it has also been held that if the Court issues a notice to the other party, as was admittedly done in this case, that is a sufficient test in that respect.

The learned Additional District Judge has not discussed Section 5 at all. Judging from his order he only considered the question whether the appellant was entitled to deduct the time taken in obtaining a copy of the order in the review proceedings. Of course he was not entitled to do that, but that, I think, is entirely beside the real point. I might send the case back to the lower Court to be dealt with in the light of Section 5 and of the cases I have cited; but the material on the record is quite sufficient for me to dispose of the case myself, and I think it better to do so.

I hold, for the reasons stated, that there was sufficient cause within the meaning of Section 5 for the delay in filing the appeal, and I therefore set aside the order appealed against and direct that the appeal be admitted and disposed of on the merits. The appellant will have his costs in this Court.

Appeal accepted.

Miscellaneous Civil Second Appeal No. 13 of 1928.

BEFORE MR. R. S. BROOMFIELD, I. C. S.

Abdul Majid and Abdul Latif sons of Didar Ali of Ajmer.

Appellants,

Versus.

R. B. Seth Biradh Mal son of Samir Mal and (2) Seth Kan Mal son of Seth Chandan Mal Oswal of Ajmer.

Respondents.

Civil Procedure Code-Order 22 Abatement-Application to execution proceedings Preliminary decree-whether a judgment-Constructive resjudicata.

(a) Provisions as to abatement do not apply to execution proceedings.

(b) A decree for partition under Order 20 rule 18 is only a preliminary decree. A final decree is passed after consideration of the Commissioner's Report under Order 26 rule 14 (3).

(c) The proceedings after the preliminary decree and before the final decree are proceedings in the suit and not proceedings in execution. In cases where there is both a preliminary and a final decree the judgment within the meaning of Order 22 rule 6 is the preliminary decree. Consequently no question of abatement arises if a party dies after the passing of the preliminary decree.

A. I. R. 1927 Oudh 156 relied upon.

(d) The doctrine of constructive resjudicata is to be applied cautiously to execution proceedings.

2 A. M. L. J. 62 Approved.

Date of judgment 7th August 1928.

Counsels.—Mr Prabhu Dayal for *Appellant.*
and Mr. Mithan Lal for *Respondent.*

Subject matter of the case.

Appeal under Section 100 and Order 42 Rule 1 Civil Procedure Code against the order dated the 3rd February 1928, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 45 of 1927.

Order.—The suit in connection with which this second appeal arises was filed twenty years ago, Suit No. 182 of 1904. The plaintiffs were mortgagees of the property of one Didar Ali, and in a previous suit on the mortgage they had brought his property to sale, purchased it themselves, and got symbolical possession of Didar Ali's share. But the property a house, was in the joint possession of several co-sharers, and so suit No. 182 of 1904 was filed for partition and possession of the said share. There were 8 defendents, (1) Abdul Gaffur (2) Abdul Shakur, (3) Musammat Kariman, (4) Abdul Majid, (5) Abdul Latif, (6) Abdul Rahim, (7) Musa

and (8) Musammat Jeo Bibi. Judgment in the suit was pronounced on 19th June 1918. Plaintiffs were held to be entitled to partition to the extent of Didar Ali's share, which was fixed at one third of the house; and the suit was decreed to that extent against defendents 3 to 6, the representatives of Didar Ali. An application for execution of the decree was made on 19th March 1925 against defendants Abdul Majid, Abdul Latif and Abdul Rahim. Certain objections were taken to the application but they were overruled, and the decision of the original Court was confirmed in appeal by the Additional District Judge and again in a Revision Application by this Court.

Subsequently the judgment debtors Abdul Majid and Abdul Latif raised a fresh objection, which they had not urged before, that the suit had abated owing to the death of some of the plaintiffs, and some of the defendants after the passing of the decree, which they contended was only a preliminary decree, not capable of execution as it stood. The trial Court held that the decree was a final decree and that the suit had not abated. In appeal the Additional District Judge, held that the decree was probably a preliminary one, but that even so there was no abatement, and that in any case the appellants were estopped from raising these pleas. A further objection, taken for the first time in the appeal, that the plaintiffs could not proceed against someof the judgment-debtors only, was also decided against the appellants. They have now come to this Court in Second Appeal.

I deal first with the question of abatement, premising that according to the statement of the learned counsel for the appellants, which however does not appear to be proved by any evidence on the record, Musammat Kariman, mother of the appellants died on 4th May 1925, and Abdul Rahim, their brother on 28th May 1927. The first point to be noted is that, under Order XXII Rule 12, the provisions as to abatement do not apply to proceedings in execution of a decree

or order ; so that if this decree of 19th July 1918 was a final decree, as the Sub Judge considered it was; and if all the proceedings subsequent to it are to be regarded as proceedings in execution, then the appellants have no case. Those proceedings have as a matter of fact been treated as if they were proceedings in execution. But the difficulty is that the decree merely decided that plaintiffs were entitled to get possession of a certain share of a house which was in the joint possession of a number of persons. It could only be executed by the appointment of a commissioner to make a partition, and the record shows that the Court had appointed a commissioner on 1st October 1927, who has been directed to make a report though nothing further has been done in that connection owing to these appeals. It seems to me that the decree which has been passed is to all intents and purposes a decree under Order XX Rule 18, that is a preliminary decree for partition, and that the final decree will be the one that the Court must ultimately pass, after consideration of the commissioner's report, under Order XXVI Rule 4 (3). On this point I agree with the learned Additional District Judge, and it follows, I think, that Order XXII Rule 12 is not a bar to the appellants contention. It has been held over and over again, of course, that procedings after the preliminary decree and before the final decree are proceedings in the suit and not proceedings in execution.

But then we have next to consider the provisions of Order XXII Rule 6, where it is laid down that "whether the cause of action survives or not there shall be on abatement by reason of the death of either party *between the conclusion of of the hearing and the pronouncing of the judgment.* The qnestions is, in cases where there is both a preliminary and a final judgment, does "judgment" in this Rule mean the former or the latter? The learned Additional District Judge has held that it means the former, the preliminary judgment relying on the case of Musammat Lakhpati-Kuer Versus

Daulat Singh, A.I. R. 1927. Oudh 156, in which the Privy Council Ruling in Lachmi Narain Versus Balmukand, 51 I. A. 321, was applied. In my opinion that view is correct The reasoning on which the judgment of the Oudh Chief Court is based appears to me quite convincing, and I have not been referred to any authorities to the contrary. Order XXII Rule 6, therefore disposes of the objection on the ground of abatement.

As for the other objection, that the plaintiffs are not entitled to proceed against these judgment debtors alone. I agree with the learned Additional District Judge that there is no substance in it. The present appellants have admittedly no right to remain in possession of any part of the house, as they have no longer any interest in it. If the plaintiffs can get the relief they require without proceeding against other judgment debtors, or placing their representatives on the record, the appellants, as for as I can see, have no right to object. Whether the plaintiffs could get an effective final decree without joining those other parties is a matter as to which I say nothing. The whole question seems to be more or less academic, because I understand that, since the order of the Additional District Judge was passed, the plaintiffs have applied to join them as parties.

I have rather more doubt as to the correctness of the first appellate Court's finding that the appellants are estopped, by the principle of resjudicata, from putting forward their present pleas. As was pointed out by this Court in Civil Second Appeal No. 3 of 1927, 2 A. M. L. J 62, the doctrine of constructive res-judicata, when applied to execution proceedings, needs to be cautionsly applied, and the same considerations would apply here. However, I am not satisfied that the lower Court is wrong, even on this point, and anyhow it is not necessary to rely upon any estoppel in the present case, which fails on the merits.

The appeal is dismissed with costs.

Appeal dismissed.

Civil Revision application Nos. 62 and 63 of 1928.

BEFORE MR. R. S. BROOMFIELD, I. C. S.

Musammat Kajji widow of Man Mal Oswal of Ajmer,
Plaintiff, Respondent, Applicant.

Versus.

Nanne khan son of Nazar Mohamed khan of Ajmer
Defendant, Appellant, Opposite Party.

(2) Yakub Ali son of Mohamed Ali Musalman of Ajmer..
(3) Wazid Ali son of Mohamed Ali Musalman of Ajmer.
(4) Musammat Nur Jahan widow of Mohamed Ali Musalman of Ajmer.
Defendants, Respondents, Opposite Party.

Successful defendant. Right of appeal. Practice-Costs on remand. Exparte decree-whether reasons can be impeached in appeal on merits.

(a) A defendent has a right of appeal, even when the decree is not on the face of it against him, if it impliedly negatives a right claimed by him against the plaintiff or the other defendants.

21 All. 117 and 9 C. W. N. 584 Relied upon.

(b) The propriety of exparte proceedings can be considered by the Appellate court even in an Appeal on merits.

30 Mad. 54 and 46 Bombay 184......Foll.

23 Cal. 738, 2 Rangoon 108 and 39 All 143 dissented from.

(c) In Ajmer-Merwara it is reasonable to prefer the view of the Allahabad High Court in certain classes of cases. But this is not an invariable practice. This court is at liberty to adopt, in cases of difference of opinion, the view that appeal to it the most.

(d) When a remand is necessitated by a mistake of the trial court and not on account of any fault of the parties the proper order about costs is to order the parties to bear their own costs.

Date of judgment 16th August 1928.

Counsels—Mr Jasoda Nandan for *Applicant.*
and Mr. Hem Chander for *Opposite Party.*

Subject matter of the case.

Application for revision under Section 115 of the code of Civil Procedure against the judgment and decree dated the 7th April 1928, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 73 of 1925.

Order.—Plaintiff brought a suit on a mortgage against four defendants, Nanne khan, Yakub Ali, Wajid Ali and Musammat Nur Jehan. The suit was heard ex-parte against Nanne khan, but the Court held that he had been improperly added as a defendent as he was not a son of the mortgagor and had no interest in the mortgaged property. A decree was passed agaisst the other defendants. Nanne khan appealed against the Decree, and the Appellate Court held that the trial Court was wrong in proceeding ex-parte against him, allowed the appeal with costs and remanded the case for re-trial in his presence.

In this revision application by the plaintiff three points have been taken:—(1) that Nanne khan had no right of appeal as there was no decree against him; (2) that, if an appeal lay, the Appeal Court could only deal with it on the merits and could not go into the question of the propriety of the ex-parte proceedings; (3) that plaintiff should not have been saddled with the costs of the appeal.

The answer to the first point is that a defendant has a right of appeal, even when the decree is not on the face of it against him, if he is adversely affected by the decree, that is if it impliedly negatives a right claimed by him against the plaintiff, and the other defendents. See Jamna Das Versus Udeyram, 21 Allahabad 117, Krishna Chandra Versus Mahesh Chandra, 9 Calcutta W.N. 584, and other cases cited in Mulla's Civil Procedure code under Section 96. That is the position here. Nanne khan claims to be interested in the mortgage. That claim is expressly negatived by the finding of the trial Judge and impliedly negatived by the decree.

The Second point is not so simple, because there is a conflict of authority. The calcutta High Court (Jonardan Versus Ramdhone, 23 Calcutta 738), the Rangoon High Court (Raj Chandra Versus Ray, 2 Rangoon 108), and the Allahabad High Court (Rummi Versus Azizuddin, 39 Allahabad 143) are in favour of the view urged for the Applicant, namely that in such an appeal the Court can not go into any question connected with the appellant's non-appearance at the hearing. On the other hand the Madras High Court (Sadhu Versus Kuppan, 30 Madras 54) and the Bombay High Court (*Parvatishankar Versus Bai Naval, 17 Bombay 733, and Jethia* Lal Versus Varaj Lal, 46 Bombay 184) have taken the other view. (In the earlier Bombay case the Court held that, though it could deal with the question of the defendant's non-appearance, it could not order a remand; but in Jethalal Versus Varajlal it was held that, under the present code, the Court has that power.) The only reason which the learned counsel for the applicant has been able to urge for preferring the former authorities to the latter is that there has been a long-standing connection between this province and the High Court of Allahabad, and that it has been the practice in the past to follow that High Court in case of conflict between it and other High Courts. But that connection has now ceased, and, though in certain classes of cases I daresay it would be reasonable to follow the former practice (it has not been by any means an invariable practice), I do not think that the preference for the Allahabad High Court can be at all strongly stressed. The matter is complicated by the fact that this Court is a High Court, not only for Ajmer-Merwara, but also for kathiawar; that is the Judge is the same; and there is a certain occurences, to say the least of it, in deciding points of law and procedure differently in the two capacities. At any rate I consider that I am at liberty to adopt the view which on the whole appeals to me most. The Madras case and the latest Bombay case are more recent than the Calcutta and Allahabad cases. The latter are considered and discussed in

the former. Adopting the Madras and Bombay view of the law, I hold that the Additional District Judge was right, not in considering the question of the propriety of the ex-parte proceedings, and in remanding the suit for a re-trial.

As for the quetion of costs, I think there is force in the contention that plaintiff should not have been made to bear all the costs of the appeal. It was a mistake of the Court itself, and not any fault of the plaintiff, that necessitated the appeal and the remand. On the other hand Nanne khan appears to have been guilty of some negligence in falling to follow up his application for restoration of the case. I modify the order of the Additional District Judge by directing that the parties should bear their own costs in that Court.

Otherwise the revision application is dismissed, and applicant must pay half the costs of Nanne khan in this Court.

The other Defendants in the case also appealed against the decree, and their appeal was held to be disposed of by the same order of remand. Plaintiff has made another revision application against the order in that appeal. Revision Application No. 63 of 1928. It is obvious, however, that as the suit is to be remanded for retrial, it must be remanded and retried as a whole, that is as regards all the defendants. Application No. 63, therefore, is also dismissed, but there will be no order as to costs.

Application dismissed.

Civil appeal No. 30 of 1928.

BEFORE MR. R. S BROOMFIELD, I C. S.

Hafiz Mohammed Bux, Bar-at-law son of Khan Sahib Sheikh Allah Bux Contractor *Applicant, Appellant.*

The Second point is not so simple, because there is a conflict of authority. The calcutta High Court (Jonardan Versus Ramdhone, 23 Calcutta 738), the Rangoon High Court (Raj Chandra Versus Ray, 2 Rangoon 108), and the Allahabad High Court (Rummi Versus Azizuddin, 39 Allahabad 143) are in favour of the view urged for the Applicant, namely that in such an appeal the Court can not go into any question connected with the appellant's non-appearance at the hearing. On the other hand the Madras High Court (Sadhu Versus Kuppan, 30 Madras 54) and the Bombay High Court (Parvatishankar Versus Bai Naval, 17 Bombay 733, and Jetha Lal Versus Varaj Lal, 46 Bombay 184) have taken the other view. (In the earlier Bombay case the Court held that, though it could deal with the question of the defendant's non-appearance, it could not order a remand; but in Jethalal Versus Varajlal it was held that, under the present code, the Court has that power.) The only reason which the learned counsel for the applicant has been able to urge for preferring the former authorities to the latter is that there has been a long-standing connection between this province and the High Court of Allahabad, and that it has been the practice in the past to follow that High Court in case of conflict between it and other High Courts. But that connection has now ceased, and, though in certain classes of cases I daresay it would be reasonable to follow the former practice (it has not been by any means an invariable practice), I do not think that the preference for the Allahabad High Court can be at all strongly stressed. The matter is complicated by the fact that this Court is a High Court, not only for Ajmer-Merwara, but also for kathiawar; that is the Judge is the same; and there is a certain occurences, to say the least of it, in deciding points of law and procedure differently in the two capacities. At any rate I consider that I am at liberty to adopt the view which on the whole appeals to me most. The Madras case and the latest Bombay case are more recent than the Calcutta and Allahabad cases. The latter are considered and discussed in

the former. Adopting the Madras and Bombay view of the law, I hold that the Additional District Judge was right, not in considering the question of the propriety of the ex-parte proceedings, and in remanding the suit for a re-trial.

As for the quetion of costs, I think there is force in the contention that plaintiff should not have been made to bear all the costs of the appeal. It was a mistake of the Court itself, and not any fault of the plaintiff, that necessitated the appeal and the remand. On the other hand Nanne khan appears to have been guilty of some negligence in falling to follow up his application for restoration of the case. I modify the order of the Additional District Judge by directing that the parties should bear their own costs in that Court.

Otherwise the revision application is dismissed, and applicant must pay half the costs of Nanne khan in this Court.

The other Defendants in the case also appealed against the decree, and their appeal was held to be disposed of by the same order of remand. Plaintiff has made another revision application against the order in that appeal. Revision Application No. 63 of 1928. It is obvious, however, that as the suit is to be remanded for retrial, it must be remanded and retried as a whole, that is as regards all the defendants. Application No. 63, therefore, is also dismissed, but there will be no order as to costs.

Application dismissed.

Civil appeal No. 30 of 1928.

BEFORE MR. R. S BROOMFIELD, I. C. S.

Hafiz Mohammed Bux, Bar-at-law son of Khan Sahib Sheikh Allah Bux Contractor *Applicant, Appellant.*

Versus.

Musammat Amna Bibi widow of Khan Sahib Sheikh Allah Bux for self and as guardian of her minor sons Mohamed Hussian and Ahmad Hussain and her minor daughter Asgari Begum residing at Ajmer *Opposite Party, Respondents.*

Indian Succession Act. Grant of Letters of Administration Extent of security.

The value of the entire property for which the grant is made is not necessairly the criterion for the extent of the security. A security for an amount which will afford a reasonable protection against malpractices is quite sufficient.

1 C. L. J. 180, 6 C. L. J. 453, 24 I. C. 202 relied upon.

Date of Judgment 21st August 1928.

Counsels:—R. S. Mithan Lal for *Appellant.*
and Mr. Ghisoo Lal for *Respondent.*

Subject matter of the case.

Appeal under section 299 Act No. 39 of 1925 against the order passed on 21st. April 1928, by the Additional District Judge, Ajmer, in case No. 50 of 1928.

Order—The Additional District Judge has ordered the applicant, to whom letters of administration have been granted of an estate belonging to him and the opponents, to furnish security to the extent of two thirds of the total value of the estate, that is about the value of the share of the opponents. The estate is a large one, and this order would necessitate security to the amount of about Rs. 1,80,000/-. It is urged in this appeal that this amount is excesive and beyond the ability of the appellant to furnish.

The order granting letters of administration to the appellant was made on 20th. May 1927, and was confirmed by this Court on 12th. December 1927, but so far, it appears, practically nothing has been done in the way of administering the estate. I see no reason to doubt the appellant's statement

that he can not furnish security to the extent of two thirds of the total value. I am also of opinion that it is not necessary to fix the amount so high. The security is required " for the due collection, getting and administering the estate", and the value of the property is not necessarily the criterion; see Manamaya Debi Versus Gangamoyi, 1 C. L. J. 180; Ameer Chand Versus Mohanund, 6 C. L. J. 453; Harendra Nath Versus Ardhendu, 24 Indian Cases 202. The administration will be subject to the control of the Court, and what is required is such security as will afford a reasonable protection against malpractices. There is a sum of Rs. 35,000/- on deposit with a local firm of bankers. The security should certainly cover that, and say a year's income of the estate and the cash already in the appellant's hands. I consider that if security be furnished for Rs. 50,000/- that will be sufficient. In addition the receipt for Government Promissory Notes and the certificates should be handed over to the custody of the Court Nazir, so that they can not be disposed of without the sanction of the Court. The Additional District Judge's order will be modified accordingly.

The appellant must take steps to comply with the order as modified without dealy, failing which it will be necessary to consider the appointment of another administrator.

Appeal accepted.

Civil Revision application No. 123 of 1928.

BEFORE MR. G. C. SHANNON, I. C. S.

Moti Lal son of Champa Lal Saraogi of Sarana, District Ajmer *Plaintiff Applicant.*

Versus

Hindu son of Kishna Gujar resident of Akhri District Ajmer *Defendant, Opposite Party.*

Civil Procedure Code Section 151 and Order 9 rule 9.

(a) A suit dismissed for default cannot be restored under section 151 if no sufficient cause is shewn under Order 9 r 9 ..

A. I. R. 1927 Cal. 158, A. I. R. 1927 Patna 369

A. I. R. 1925 All 610 and A. I. R. 1927 Lah 622 Foll.

53 I. C 252, 58 I. C. 748, A. I. R. 1927 Rangoon 58 and

A. M. L. J. 1927 Supp· 20 dissented from.

(b) Restoration of a suit dismissed for default should not be refused if the plaintiff was late by a few minutes only in arriving on the date of hearing.

46 Mad. 60, A. I. R. 1925 Bom. 424 and

A. I. R. 1924 Bom. 392 Relied upon.

Date of judgment 14th February 1929.

Counsels —Mr. G. P. Mathur for *Applicant*
and Mr Prabhu Dayal for *Opposite Party*

Subject matter of the case.

Application for revision under Section 25 of the Provincial Small Cause Courts Act IX of 1887 against the judgment dated the 14th. September 1928, passed by the Judge Small Cause Court Ajmer, in suit No. 2852 of 1927.

Order.—In this revision application a large number of authorities have been quoted, but the facts can be put in a small compass. The applicant had filed a suit against Hindu (Respondent) and obtained a decree. Against that Hindu filed a Revision Application and obtained a stay order to prevent Moti from proceeding further with another (later) suit for rent (i e. on a recurring cause of action). The revision application took a long time to come up for decision. The applicant and his pleader were both absent on one occasion when the later suit was brought up (only for a further order of adjournment), so the suit was dismissed but restored as the pleader came in a few minutes later. On a subsequent hearing the applicant's pleader was away and the applicant himself a little late as he was taking his meals—His suit was dismissed and a request for restoration to file refused. From that this revision application.

I have had numerous rulings cited to me, and the Counsel for the applicant asked me to restore the suit by bringing section 151 Civil Procedure Code into play. He quoted 53 Indian Cases 252 (Bilasrai vs. Ason das) and 58 Indian Cases 748, A.I.R. 1927 Rangoon 58 but there is a considerable trend of judicial opinion to the contrary, i e. A.I.R. 1927 Calcutta 158, 1927 Patna 369 and 1925 Allahabad 610—This last is a *Full Bench ruling* and perhaps had not *been brought to the* notice of Mr. Murphy Judicial Commissioner when he passed the order in Civil Revision Petition No. 48 of 1927 (Ajmer-Merwara law Journal 1927 Supplement Page 20) The case law is discussed at some length in A.I.R. 1927 Lahore page 622. The tendency here is to follow the Allahabad precedents and I am tempted to follow the Full Bench ruling quoted above and not invoke section 151 Civil Procedure Code. The ruling in 1927 Lahore page 622 shows that much of the ground has been cut from under the older Bombay and Allahabad decisions.

But there is another set of decisions that give me a very good line for my decision in this case. I refer to the rulings in I.L.R. 46 Madras 60, A.I R. 1925 Bombay 424 and 1924 Bombay 392; where it is pointed out that dismissal for a few minutes lateness in arriving at Court is too heavy a penalty. At the same time I would observe that it is possible to cast the late comer in costs. I allow this application and set aside the order of the lower Court and order the applicant's suit to be restored to file for trial on the merits. In the circumstances of the case the parties should each bear their own costs in this Court. The costs in the lower Court hither-to incurred to be costs in the cause.

Application allowed.

Criminal Application No. 33 of 1929.

BEFORE MR. G. C. SHANNON, I. S. C.

Fateh Chand Sethi of Ajmer *Complainant-Applicant.*

Versus.

Jethmal of Ajmer *Accused Opposite Party.*

Offence of defamation-Trial by Hon. Magistrates-Propriety of.

The offence of defamation is a highly technical branch of law and it is not possible for a Bench of Honorary Magistrates to properly appreciate the many potentialities in it for the defence or the prosecution. Such a case therefore should not be allowed to be tried by a Bench of Honorary Magistrates.

Date of Judgment 4th October 1929.

Counsels:— Mr. Kaushaldas Vakil for the *Applicant.*
Mr. Raghunath Advocate for the *Opposite party.*

Order.—This is an application under Section 526 of the Criminal Proceedure Code for a transfer of a certain case of defamation pending in the Court of Honorary Magistrates Bench 'A' to the Court of some other Magistrate. The applicant is the complainant in this case while Jethmal the Opponent is the accused.

The grounds on which the transfer is sought are that the offence of defamation is of a highly technical nature and the Honorary Magistrates are not lawyers, and would not properly appreciate the legal issues involved in the case. Secondly there are two factions in the community to which they belong. The complainant might be decribed as reformers while the accused belongs to a less progressive section. Amongst the members of the Bench is a certain Doctor Gulab Chand Patni He is not one of the members of quorum trying the case, but

on Agust 27 last when the case came up for hearing he continued to sit in the Court after other business had been disposed of. Further more Doctor Gulab Chand is a member of the accused's faction and also publisher of the SYADWAD MARTAND, newspaper in which an article appeared on 15th August 1929 which attempted to prejudice the Complainant and brings him and his party into disrepute. It was therefore contended on behalf of Fateh Chand that he had reasonable apprehension that he would not receive a fair and impartial trial of this case before the Bench 'A' of the Honorary Magistrates

Mr. Raghu Nath for the accused noted the fact that there were 8 members of the Bench 'A' and it was not entirely complimentary to remaining 7 members to suggest that they would be influenced by the presence of Doctor GulabChand or the fact that he was the member of that bench. It was also urged that a bench would probably be able to appreciate Defamation more shrewdly than a single magistrate. Mr. RaghuNath contended that there was no ground for interference.

There is a great deal to be said for the argument that the offence of Defamation is a highly technical branch of law. There are no less than 10 exceptions i.e. under which a good piece of defamation may not be punishable and it seems to me highly improbable that the bench even if it contains a retired Tahsildar, will properly appreciate all these many potentialities for the defence or the prosecution. I am definitely of opinion that a case of this nature should not be tried by a bench.

I do not think for one moment that the other members of bench 'A' would be influenced by the fact that Doctor Gulab-Chand is one of their colleagues. But I do very much regret the article which he saw fit to publish. It is nothing short of Contempt of Court, and in England, he, the writer, and the editor of the paper would all heve been fined for Contempt of

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Court, for commenting on pending proceedings with a view to prejudicing the trial. A man who is a magistrate should not have published an article of that kind. It is a scurrilous and offensive article.

I therefore direct that this complaint be tried by the City Magistrate of Ajmer. He should obtain the complaint and record from bench 'A' of the Honorary Magistrates.

Application accepted.

Errata to Volume III.

(*Please correct wherever necessary.*)

At	Page	52	Line	11	*For*	Predecesor	*Read*	Predecessor
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Short Notes of Important Judgments.

1. Contract Act. Sections. 196 and 228. Principal not liable for Agent's transactions in which the latter has deviated from the former's instructions. Principal may ratify such a transaction if it results in profit and may repudiate it if it results in loss.

Civil Revision Application No. 29 of 1928.

Date of judgment 6th September 1928.

Parties:—Firm Sheo Narain Balmukand of Gangapur Versus Firm Ghisalal Pokhar Mal of Kekri.

2. Factories Act section 2 (2) Persons employed for packing of ice in saw-dust fall under the definition of the word 'employed' as it is a process towards finishing of the article to a stage when it is in a suitable condition to be put on the market.

Criminal Revision Petition No. 22 of 1929.

Date of judgment 15th September 1929.

Parties:—B. Prag Narain Vakil of Agra Versus The Crown.

3. Award. Revision. A revision application would lie to the High Court if the court proceeds in such a manner so as to come within the ambit of section 115 Civil Procedure Code.

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Date of judgment 29th November 1930.

Parties :—Chagan Mal Versus Nand Mal

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4. Ornaments. Stridhan. Presumption.—There is no presumption that ornaments are Stridhan. On the contrary in the absence of any evidence the presumption would be that the ornaments formed part of the estate of the deceased husband or father.

Miscellaneous Civil appeal No. 93 of 1930.

Date 23rd December 1930.

Parties :—Mst. Kisturi Versus Kesari Mal.

5. Insolvency Act. Debt. Not barred.—A debt not barred at the commencement of the Insolvency proceedings does not become time barred for the purposes of those proceedings by any lapse of time.

Miscellaneous Civil appeal No. 1 of 1931.
(Railway Jurisdiction)

Date 26th March 1931.

Parties :—Bulaki Mal & Sons Versus C. H. Westron & others.

6. Insolvency Act. Section 20. For the appointment of ad-interim Receiver no notice to the creditors is necessary.

Miscellaneous Civil appeal No. 5 of 1931.

Date 18th April 1931.

Parties :—Rameshwar Lal Versus Laxmi Narain.

7. Civil Procedure Code. Order 21 rule 2. An oral agreement as an adjustment of a decree cannot operate as a bar to an execution application.

Civil Revision Application No. 117 of 1931.

Date 20th April 1930.

Parties :—Noor Mohamed Versus Sukhan Raj & Co.

8. Transfer of Property Act. Sub-mortgage-Registration. No notice.—Registration of a sub-mortgage is no notice to the Mortgagor; consequently payment of the mortgage amount by the mortgagor to the mortgagee extinguishes the mortgage and the sub-mortgagee has no remedy against the mortgaged property.

Civil Second appeal No. 49 of 1930.

Date 11th May 1931.

Parties :—Seth Panna Lal Versus Seth Tikam Chand.

9. Contract Act. Surety bond.—If a surety bond is not executed simultaneously with the principal bond, the suretyship is without consideration

Civil First appeal No. 97 of 1930.

Date 27th April 1931.

Parties :—Daya Bhai Versus Doctor Onkar Singh.

10. Reference-Revision.—Even if a reference was or is open to a party under Section 17 of the old Courts' Regulation, the High Court has power to interfere in revision in a proper Case.

Civil Revision application No. 151 of 1930.

Date 14th May 1931.

Parties :—*Seth Kalyan Mal Versus Mst. Dhanta Devi.*

11. Stamp Act. Contract-Validity of.—Insufficiency of Stamp duty will not affect the validity of a contract.

Civil Revision application No. 101 of 1930.

Date 12th December 1930.

Parties :—Sualal Versus Firm Kanahiyalal Ramchander and Ram Niwas.

12. Criminal Procedure Code. Witness-Diet expenses. Civil suit.—There are no provisions in the Criminal Procedure Code authorising a Magistrate to direct a complainant to pay a certain sum as expenses or diet money to a witness summoned on his behalf.

There is also no implied contract or agreement between a party to a criminal case and his witness for payment of diet money. Consequently no civil suit would lie for its recovery.

Civil Revision application No. 29 of 1931.

Date 25th April 1931.

Parties· Allah Noor Versus Mola Bux.

13. Small Cause Court. Rent-Suits.

Non-Registration. Objection-Second Appeal. Muafi Rent-Contract-Registeration.— The Small Cause Courts in Ajmer-Merwara have not been invested with powers to try all classes of rent suits. They can only try suits for house rent.

Objection about inadmissibility of a document on ground of non-registration can be taken for the first time in second appeal.

A contract to collect Muafi rent requires compulsory registration because it is a benefit arising out of land.

Civil second appeal No. 89 of 1930.

Date 2nd January 1931.

Parties :—Mahant Sudersan Dass Versus Gulabchand.

14. Small Cause Court. Suit for mesne Profits-Jurisdiction Article 31.—A suit for recovery of damages or mesne profits for the use and occupation of a house is not barred from the cognizance of a Small Cause Court under Article 31. It is only when a defendant is alleged to have actually received the profits belonging to a plaintiff that the suit is barred under this article.

Civil Revision application No. 126 of 1930.

Date 15th January 1931.

Parties :—Choga Lal Versus Jai Narain.

15. Railway Receipt - Instrument of Title-Transfer.—A Railway receipt is an instrument of title. But mere delivery of it is not sufficient to transfer the title. There must be an endorsement in writing on it.

Civil Revision application No. 44 of 1931.

Date 15th May 1931.

Parties —The Secretary of State Versus Ramdhan Das Kalyan Mal.

16. Lunacy. Medical Certificate. Insufficiency of.—Only after a lunatic has been so found by inquisition in the prescribed manner has the court jurisdiction to proceed to consider the appointment of a manager A medical certificate is not enough.

Miscellaneous Civil appeal No. 74 of 1930.

Date 2nd December 1930.

Parties :—Mst. Chanda Versus Mool Chand.

17. Pleader's Fees. Contested claims.—Even when defendants confess judgment after issues have been framed, pleader's fees is to be calculated as in an uncontested claim.

Civil Revision application No. 55 of 1931.

Date 11th April 1931.

Parties :—Shive Narain Versus Raja Rànchor Sen.

18. Civil Procedure Code-Order 6 rule 17.—A plaintiff cannot be allowed, without amendment of the plaint, to shift his position so completely as to alter the capacity in which he purported to sue.

Civil Revision application No. 112 of 1930.

Date 12th December 1930.

Parties :—Chand Versus Kistur Mal.

19. Civil Procedure Code. Section 73. For purposes of rateable distribution it is not necessary to attach the property, mere making of an execution application before sale-proceeds are received is sufficient.

Civil Revision application No. 119 of 1930.

Date 11th December 1930.

Parties :—Bansi LalVersus Safiuddin, Nath Mal & others.

20. Suit against Shebait-Non-joinder of temple.—A suit against a Shebait of a temple is not bad for non-joinder of the temple merely because the defendant has not been described in the title as Shebait.

Civil second appeal No. 22 of 1930.

Date 19th January 1931.

Parties :—Dadmat Das Versus Mandır Sri Raghu Nathji.

21. Execution application. Plea of Limitation. No estoppel or waiver.—In an execution case when the court has gone no further than the issue of a notice to the judgment-debtor and has made no order for execution-the question of bar of limitation can be raised in a subsequent application for execution. In such a case no question of estoppel or waiver arises.

Civil Revision application No. 18 of 1931.

Date 1st May 1931.

Parties :—Syed Abdul Aziz Versus Chand Mal.

22. Joint Hindu Family Business. Acknowledgment by one member:—Members of a Joint Hindu family carrying on a family business are in the position of partners as regards acknowledgment by one member of the family of a debt due by the family business can be availed by the creditor against the family as a whole.

Civil Revision application No. 56 of 1931.

Date 6th May 1931.

Parties:—Firm Jeth Mal Kishen Lal Versus Mangi Lal.

23 Death of Respondent. Appeal. Abatement.—The only criterion is whether an effective decree can be passed against the surviving respondents.

Civil appeal No. 54 of 1930.

Date of judgment 23rd January 1931.

Parties:—Seth Amar Chand Versus Dan Mal Bachraj.

24. C. P. Code Order 1 rule 9. Abatement. Appeal.—When necessary notice is issued on an application under Order 1 rule 8 it is immaterial whether any formal order indicating permission under the rule has or has not been recorded. The suit is to be deemed a representative suit.

Even where the suit had abated the effect of bringing fresh representatives on the record would be to set aside abatement and the question cannot then be agitated in app

Civil Second appeal No. 72 of 1930.

Date of judgment 4th M

Parties:—Bagichi Dallalan Versus Hira Das an Das.

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Volume IV. Part I.

The Ajmer-Merwara
LAW JOURNAL.

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AND

MR. MOHAN LAL, CAPOOR, B.A., LL.B.,

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Alphabetical Index of cases. Vol IV.

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M

Subject Index. Vol. IV.

1. **Abatement.**—(*a*) The C P.C does not contain any specific provision for the abatement of a suit or an appeal as a whole when the right to sue or appeal does not survive. Such an abatement is in the nature of a dismissal of the suit or appeal as incompetent and amounts to a decree.

   (*b*) By death of a coparcener after decree, the appeal does not abate as a whole. 4. J. 77.

2. **Auction sale.**—The absence of a final decree for sale will not necessarily vitiate the proceedings of the Court in execution leading to the sale of the property if an order for sale is passed on a notice to the Judgment-Debtor

   4. J. 58.

3. **Adverse Possession.**—*When the hereditary manager of an estate* alienates the estate, the possession of the alienee becomes adverse to the manager and his successors from the date of the alienation as heritable estates could not be created to take effect as successive life estates

   4 J. 44.

   ——Mere non-payment of rent for many years would not constitute the tenant's possession adverse to the Shamlat. To constitute adverse possession there must be same definite act on the part of the tenant constituting a denial of the landlord's title.

   4. J. 61.

4. **Appeal.**—(*a*) An appeal is a mere continuance of the original proceeding initiated by the filing of the plaint.

   (*b*) A right of appeal is a vested right which inheres in a party from the commencement of the action in the Court of first instance

   (*c*) The right of second appeal is not a natural or a birth right of a party.

   4. J. 7.

   ——An appeal lies from an order of abatement.

   4. J. 77.

—A respondent in second appeal can not reopen issues of fact decided against him by way of filing cross objections.

4. J. 84.

5. **Burden of Proof.**—In a son's suit for declaration that the mortgage was invalid, the burden is on the mortgagee to prove that it was for legal necessity or an antecedent debt.

4. J. 22.

6. **Civil Procedure Code.S. 11.**—(*a*) When an order directing execution to proceed has been made, that order if not reversed in appeal will operate as res-judicata in a subsequent application regarding the validity of the first application. But if such an order is made without notice to the Judgment-Debtor, the order does not operate as res judicata.

(*b*) The order at one stage of a proceeding does not operate as res-judicata by implication in respect of an issue raised at a later stage of the same proceeding.

4. J. 94.

—For a Judgment of an issue against one person to operate as res-judicata as against that person's alleged successor, it must be shewn that the successor is in fact the legal representative of the former party in respect of the issue in question

4 J. 108.

S. 60-clauses (h) & (i). (*a*) The word 'salary' in cl. (h) of S. 60 C P. C. means the pay of a post drawn by a man on duty, while the word, 'allowance' means all that the incumbent receives in the shape of leave pay while absent from duty.

(*b*) The leave pay is worked out at the average pay *for the preceeding 12 months and if it is less than the salary of* the post, it is wholly exempt under S. 60 (h) C. P. C.

4. J. 37.

S 99.—The trial by a Sub-Judge of a suit triable by a munsiff is a mere irregularity curable by S. 99 C. P. C.

4. J. 61.

S. 105.—An order setting aside abatement or exparte decree can not be challenged in appeal as it is not an order affecting the merits of the case.

4. J. 19.

S. 110. clauses 1 & 2—(*a*) The second clause of S. 110 C. P. C. is to be read as an alternative to the whole of the first clause and not merely as an alternative to the second restrictions in the first clause.

(*b*) Where the decision in appeal affects an interest in property of the value of ten thousand rupees or upwards even though outside the immediate subject-matter of the suit clause 2 of S. 110 would apply.

4. J. 52.

S. 115.—If the Court acts in the exercise of its inherent jurisdiction otherwise than in accordance with the provisions of O. 9 r. 9 and 13, it must be held to have exercised a Jurisdiction not vested in it by law.

4. J. 39.

(*a*) It can not be held that the executing court acted without Jurisdiction in ordering the sale, if an order for sale is passed after notice to the Judgment Debtor.

(*b*) Further it can not be held that the court acted irregularly in not taking into consideration an objection which was never put forward before it.

4. J. 58.

——Discretion to fix instalments is a Judicial discretion and failure to exercise it in a Judicial manner is a ground for revision.

4. J. 75.

S. 149.—Concession allowed by this section can not be claimed as of right It is not obligatory upon the court to allow time to remedy a deficiency in court fee in the case of a memo. of appeal.

4. J. 27.

S. 151.—(*a*) The Jurisdiction under Section 151 C. P. C is of a residuary nature and can not be exercised in respect of a matter for which specific provision is made in the C P. C.

(*b*) The court has no Jurisdiction under S 151 C. P. C. to set aside an exparte decree or to restore a suit dismissed for default, if no sufficient cause is shewn for doing so.

4 J. 39.

O. 17. r. 3.—This rule has no application, where a defendant fails to appear and an order directing the suit to proceed exparte is passed, even though the decree is passed on merits

4. J. 34.

O. 20. r. 11.—Where no evidence has been adduced on the question of defendant's inability to pay, a court is not entitled to fix instalments.

4. J. 75.

O. 21. r. 90.—Under O. 21. r. 90. C. P C. the only ground for setting aside a sale, is some material irregularity or fraud in publishing it. Non-mention of the valuation of the property in the sale proclamation is not a material irregularity.

4. J. 58.

7. **Cesses.**—The levy of cesses *e. g.* Kholri, Jhumpi, Andhli and Neota by Istimrardars has never been prohibited by Government and is therefore not illegal. Colonel Dixon's Robkar of 1854 refers only to Patels & Bhumias and not to Istimrardars.

4. J. 108.

8. **Courts Regulation No. I of 1877.**—The old Courts Regulation is not merely procedural. It not only confers but also restricts the rights of appeal laid down by the C. P. C.

4. J. 7.

SS. 5 & 25.—Under S. 5, power to define such Jurisdiction was not specifically reserved to the Chief Commissioner and so sections 5 & 25 should be read in a non-contradictory nature. Under S. 25 the Chief Commissioner has power to define the Jurisdiction of various Sub-Judges and Munsiff's in the District and these *Courts exercise Jurisdiction only within the local limits so defined*

4. J. 69.

S. 17-Reference.—Under S. 17 of Ajmer Courts Regulation of 1877. Reference in forma pauperis is competent. 4. J. 92.

9. **Courts Regulation No. IX of 1926 (New)**—Under the new Regulation all second appeals lie to the Court of the Judicial Commissioner. District Judge has no Jurisdiction to hear second appeals even in cases filed before its coming into force.

4. J. 15.

——Where the Jurisdiction of Sub-Judges and Munsiffs is defined by the Chief Commissioner under S. 7 of Regulation No. IX of 1926, *the Commissioner has no power to limit such* Jurisdiction under S. 25 of the same Regulation

4. J. 69.

10 **Custom.**—A custom to obtain legal recognition must be shewn to be of immemorial existence, certain and invariable.

4. J. 108.

11. **Decree-setting aside of.**—A suit to set aside a decree passed by a Court without territorial Jurisdiction is maintainable for there is a lack of Jurisdiction ab-initio, but no suit would lie for want of pecuniary jurisdiction.

4. J. 103.

12. **Easements Act.**—(*a*) Every person has a right to add to or build his own premises provided he does so without material invasion of the right of his neighbours.

(*b*) To justify the grant of an injunction, the threatened disturbance must interfere materially with comfort of the owner.

(*c*) The test is laid down by S. 33 of the Easements Act.

(*d*) In such a case the Court is entitled to take into consideration its own opinion formed on personal inspection and base its decision on it.

4. J. 84.

13 **Evidence Act S. 27.**—(*a*) To see whether a statement is admissible under S. 27, it is necessary to know whether the alleged discovery of fact was made in consequence of the information so conveyed

(*b*) The principle underlying is that discovery of fact is a material guarantee of the truth of the particular information, which led to the discovery.

(*c*) Such a statement alone is not sufficient to support a conviction.

4. J. 100.

S. 30.—Confessions under this section are not statements made on oath and the accused against whom they are made have no opportunity to cross examine the person making the confession and so the weight to be attached to a confession against a co-accused is something less than the weight to be attached to the evidence of an approver.

4. J. 72.

14. **General clauses Act S. 26.**—By virtue of S. 26 General clauses Act and S. 71 I. P. C. it is not illegal to punish abetment of the offence under the Salt Act under S. 117 I. P. C.

4. J. 1.

15. **Hindu Law.**—(*a*) Joint Family Property—whether a property is a joint family property is a question of fact.

(*b*) Rights of Manager and father—according to the interpretation of the Mitakshara in U. P. a coparcener can not alienate his undivided interest without the consent of the other coparceners except for legal necessity or in the case of father, for payment of an antecedent debt.

(*c*) The whole of the family estate is liable in a personal decree against the father unless the sons prove that the debt was contracted for illegal or immoral purpose.

4. J. 22.

16. **Interpretation of statutes.**—A statute giving or taking away a right of appeal is not merely procedural and has no retrospective effect. The pending suits are governed by the old law unless express provision is made regarding them in the new statute.

4. J. 7.

17. **Limitation.**—Limitation is purely a matter of procedure and no litigant has a vested right in procedure. If the law of Limitation is changed during the pendency of a suit the new law governs the case in its further stages and not the old one.

4. J. 7.

Art. 10 & 120.—Suit against a rival claimant is not a suit for pre emption but for substitution on the ground of a preferential right to pre empt. Art 120 applies and not Art 10. But if no steps are taken within a year after sale towards pre-emption the suit is barred. 4. J. 15.

——Limitation for an application under S. 17 of the Courts Regulation is to be computed after excluding time taken up in obtaining copy of judgment.

4. J 92.

——Amendment of the Limitation Act does not operate retrospectively, so as to validate applications which were time barred under the old law.

4. J. 94.

18. **Land and Revenue Regulation-S. 7.**—S. 7 *of the Regulation* apply to agricultural lands and building sites whether situate in a village or town and under that Regulation an occupant of unimproved shamlat land is a statutory tenant-at-will.

4. J. 61.

19. **Maintenance. Grant-Nature of**—Successive enjoyment for generations, without interference, of land granted to the original grantee for maintenance justifies the presumption that the original grant was intended to be absolute.

4. J. 44.

20 **Mohemmadan Law.**—Adoption is unknown to Mohemmadan Law. Any custom by which it is recognised is to be strictly proved.

4. J. 44.

21. **Musalman Wakf Act-S. 10**—Failure to file accounts amounts to an offence under S 10 of the Act and hence the District Court has no power to punish for such a failure which can only be done by Magistrate after a due trial.

4. J. 97.

22. **Penal Code, SS. 40, 71 and 109-117**—The effect of these sections is that abetment of any offence is an offence under the Penal Code, whether the act abetted is itself an offence under the Penal Code or not.

4. J. 1.

23. **Possession.**—Even if a person has not a complete legal title, if he is in lawful possession of a property for a long time, he is entitled to protect his possession against an outsider.

4. J. 32.

24. **Practice.**—The strict interpretation of Mitakshara as adopted by the *Allahabad High Court must be followed in Ajmer-Merwara.*

Where there is divergence of views of the different High Courts, Allahabad view is to prevail.

4. J. 27.

25 **Pre-emption. Regulation No. III of 1877.**—Greater utility is no ground for pre-emption unless a custom to the contrary is established.

4. J. 15.

(*a*) In the case of rival claimants for pre-emption the fact that there is a prior decree in favour of one gives him *no* preference over the others, nor in the absence of a custom larger extent of vicinage a criterion for determination *of the* question of priority.

(*b*) In such cases the best way of deciding the rival claims is to cast lots on the analogy of S. 9 of the Laws Regulation.

4 J. 64.

(*a*) The burden of proving a custom of pre-emption in the sub-division in which the property is situate lies upon the plaintiff.

(*b*) A mohalla in Ajmer is a unit for the purposes of S. 8 of Regulation No. III of 1877.

(*c*) Evidence of custom of pre emption in one mohalla is not sufficient proof of the existence of a similar custom in the other mohalla.

(*d*) A single instance of pre-emption even in conjunction with supplementary evidence afforded by instances from other mohallas, is insufficient to prove the existence of a custom in a mohalla.

4 J. 61.

26. **Provincial Small Cause Court Act.—S.25**—Under S. 25 of P. S. C. Courts Act, the High Court is not intended to perform the functions of a court of appeal and would not ordinarily interfere on questions of pure fact. Scope of S. 25 explained.

4 J. 66.

27. **Rent.**—Rent as opposed to compensation for use and occupation can only be claimed from the date of the notice of demand and not for a period prior to it.

4 J. 61.

28. **Review.**—(*a*) It is no ground for review that another judge might take a different view of the law, nor that if another opportunity were given, the court might be persuaded to come to another conclusion.

(*b*) If the court has to go deeply into the whole record and law bearing on the case, it is not an error apparent on the face of the record.

4 J. 7.

29. **Salt Act—S. 9**—S. 9 does not embrace all abetments but deals only with simple cases of abetment. So punishment for serious cases of abetments by the public at large under S. 117 I. P. C. is not illegal. Effect of SS. 40 and 71 I. P. C. and S. 26 General clauses Act discussed.

4 J. 1.

Criminal Application No. 43 of 1930.

BEFORE Mr. E. H. P. JOLLY I.C.S.

Chand Karan Sarda Advocate, Ajmer,
Amicus- curiae—*Applicant.*

In Re.-Crown through M. Atiquallah Khan Sub-Inspector of Police and Salt Revenue Officer, Pushkar—*Opposite Party.*

Versus.

Pandit Sohan Lal son of Misri Lal
Brahmin of Pushkar—*Accused.*

Salt Act Section 9. I.P.C. Section 117.

(*a*) The punishment under Section 117 Indian Penal Code for abetment of an act which is an offence under the Salt Act and even though not an offence under the Penal Code is not illegal Section 9 of the Salt Act does not embrace all abetments but deals only with simple cases of abetment by individuals while Section 117 Indian Penal Code applies to serious cases of abetment by the public at large.

General Clauses Act S. 26 I.P.C. Ss. 5 and 71.

(*b*) Whether an act is a separate offence or not under the Penal Code is immaterial, by virtue of Section 26 of the General Clauses Act and Section 71 of the I. P. C. it is not illegal to punish abetment of an offence under the Salt Act under Section 117 of the Indian Penal Code even if a punishment is provided by the Salt Act itself for such an offence. The principle that the provisions of a Special Act override the provisions of a General Act has been accorded very considerable but not universal recognition and the provisions of Section 5 of the I. P.C. are to be read in a manner that would reconcile them with those of Section 26 of the General Clauses Act. The provisions of a General Act would have no application only when the provisions of a Special Act are so drafted as to exclude the application of the General Act specifically or by necessary implication. The use of the words

'within the meaning of the Indian Penal Code' in Section 9 (c) of the Salt Act does not specifically or by necessary implication exclude the application of the provisions of the Indian Penal Code. To make the provisions of Section 26 of the General Clauses Act and Section 71 of the Indian Penal Code applicable it is not necessary that an act should be an offence both under the Special and the General Act.

Indian Penal Code Sections 40 and 109-117.

The effect of the provisions of Sections 40 and 109-117 of the Penal Code is that abetment of any offence is an offence under the Penal Code whether the act abetted is itself an offence under the Penal Code or not.

Date of Judgment—12-12-1930.

Counsels:--Mr. Gauri Shanker Bar-at-law for the applicant.

The Public Prosecutor for the Crown.

Subject matter of the case.

Application for revision under Sections 435 and 439 Criminal Procedure Code against the order dated the 8th October 1930, passed by the Sessions Judge, Ajmer.

ORDER.

This order deals with six companion applications for revision Nos.43, 44, 45, 46, 47, 49 and 50 of 1930. The point at issue in all these cases is the same and may be briefly stated as whether a conviction under Section 117 I. P. C. is competent in view of the provisions of Section 9 *(c)* of the Indian Salt Act XII of 1882. The arguement advanced on behalf of the applicants is to the effect that Section 9 *(c)* of the Salt Act creates a substantive offence of abetment in respect of offences under the Salt Act and therefore by the provision of Section 5 I. P. C., the provisions of the Penal Code dealing with abetment are excluded in respect of offences under the Salt Act; in other words any sort of abetment of an offence under the Salt Act is punishable under the Salt Act alone and not under the Penal Code.

Now it is provided by Section 71 I. P. C. and Section 26 of the General Clauses Act where an Act constitutes an offence under two or more enactments the offender is liable to be punished under either or any of those enactments but he may not be punished twice for the same offence. It is argued however that this provison is not applicable where the act in question is not a separate offence under each of the enactments as is alleged to be the position here. In support of this argument is cited the case of Oudh Bar Association in Re. King Emperor Versus Mohan Lal reported in Oudh Weekly Notes Vol. VI at page 497. It is there conceded that the provision of Section 26 of the General Clauses Act apply in such a case as Queen Versus Ram Chandrappa (6Mad. 249) where the failure of the accused person to obey a certain order constituted an offence both under a local Regulation and under the Penal Code though the act was much more heavily punishable under the Penal Code than under the local Regulation.

It is sought however to distinguish the present case on the ground that, as stated in the judgment in the Oudh Case referred to above, here the act abetted is not a separate offence under the Indian Penal Code but is an offence exclusively under the Indian Salt Act, and it is argued that in such circumstances the provisions of Section 26 of the General Clauses Act have no application. Now it is undoubtedly true that the act abetted, *viz* unauthorised manufacture of salt, is an offence under the Salt Act only and not under the Penal Code but that is not the act for which the offenders here have been convicted and punished; the act for which they have been punished is the act of abetment; the effect of the provisions of Sections 40 and 109-107 of the Penal Code is that abetment of any offence is an offence under the Penal Code whether the Act abetted is itself an offence under the Penal Code or under some other enactment, and I am unable to see that this remains any the less true even if the other enactment itself provides a penalty for abetment of contra-

vention of its own provisions. By way of illustration we may consider the case of an enactment such as the Forest Act where no specific provision is made for penalising abetment of offences under the Act itself; abetment of an offence under the Forest Act is then punishable under the Indian Penal Code as an offence under one of the Sections 109-117 I.P.C.; now if we assume that the Forest Act is amended by the addition of a section penalising abetment of an offence under the Act, such addition renders such an act of abetment any the less an offence under the Indian Penal Code in the absence of any specific provision to the contrary? It is no doubt true that the penal sections of the India Penal Code relating to abetment are not self-sufficient in so far as it is necessary to go beyond those sections in order to establish that the act abetted is itself an offence, but by reason of the provisions of section 40 of the Penal Code it is immaterial whether for that purpose we have to look to some other section of the Penal Code or to some section of some other enactment, in the present case Section 9 (*a*) of the Indian Salt Act It appears to me clear therefore that the acts which formed the subject matter of the present prosecutions constituted offences within the definition both of Section 9 (*c*) of the Indian Salt Act and Section 117 of Indian Penal Code, read with Section 9 (*a*) of the Indian Salt Act and that prima facie the provisions of Section 26 of the General Clauses Act are applicable.

The argument that when a general and a special Act each provides different punishments for the same offence the provisions of the special Act in that respect should be deemed to over side those of the general Act is of a different nature and is based upon the provisions of Section 5 of the Indian Penal Code. This is a principle which has undoubtedly been accorded very considerable, though I venture to think not universal, recognition (cf. The case reported in 6 Mad. 249 cited above). Section 5 of the Penal Code provides that nothing in that Act is intended to repeal, vary, suspend or

effect any of the provisions of any special or local law and this has to be reconciled with the provisions of Section 26 of of the General Clauses Act. Now it is conceivable that the provisions of a special Act might be so drafted as specifically or by implication to exclude the application of the provisions of a general Act and where that is the case it would undoubtedly be wrong to apply the provisions of the general Act. In the present case it is suggested that all the penal provisions of the Penal Code relating to abetment are so excluded by the words "within the meaning of the Indian Penal Code" which qualify the word "abets" in Section 9 (*c*) of the Indian Salt Act. These words, it is suggested, connote abetment in all or any of the forms and variations rendered punishable under the Penal Code, including that is to say simple abetment and the aggravated form of abetment contemplated in Section 117 of the Penal Code. It seems to me however that to extend the word "meaning" to cover not only the definition and explanation of the act of abetment but also the various offences into which the element of abetment enter is a plain violation of the language used. The words "within the meaning of the Indian Penal Code" convey to me merely the idea that in order to ascertain what constitutes abetment we are to look to the relevant sections of the Penal Code that is to say sections 107, 108 and 108A. Nor does it seem to me reasonable to suppose that by the use of those words the Legislature intended to exclude the possible application for example of Section 117 of the Penal Code; had it been the deliberate intention of the Legislature to enact that while abetment of all other offences by the public should be punishable with three years rigorous imprisonment abetment of offences under the Salt Act by the public should alone be punished with not more than six months imprisonment I venture to think that that intention would have been clearly expressed in section 9 (*c*) of the Salt Act. The Salt Act makes no specific provision for the offence of abetment by the public and I see no reason why that lacuna should not be filled by reference to the Indian Penal Code in exactly the

same way as the absence of any specific penal provision for abetment in, say, the Forest Act is remedied by reference to the appropriate provisions of the Penal Code. The existence of Section 117 of the Penal Code implies the recognition of the fact that abetment of an offence by the public is of a more serious nature than a simple act of abetment, it is indeed a sort of multiple abetment and as no provision is made for such multiple abetment in the Salt Act and there is in that Act nothing which would specifically exclude the application of the provisions of section 117 I. P. C. the offence is in my opinion properly punishable under section 117 I.P.C.

The only other question which has been raised is that of the alleged severity of the sentences passed. These, in all cases but one, amount to two years rigorous imprisonment. The maximum sentence under section 117 I.P.C. is three years imprisonment and it must be recognised that persistent attempt to induce the public to break the law merely for law breaking's sake do constitute a serious menace to peace and order and to society generally. The fact that I have before me here no less than nine cases of persons convicted under Section 117 indicates that the attempts were wide-spread. It has been urged however that they were in fact fruitless so far as the district of Ajmer-Merwara is concerned; that no doubt as due to no fault of the offenders, but the punishment provided for abetment in the Penal Code is governed largely by the result of the abetment and it is, I understand, a fact that the efforts of the offenders in the present case were attended with no great results in Ajmer. The sentence of two years rigorous imprisonment is to my mind some what severe, and while I by no means desire to lay down any standard or to be understood to imply that circumstances might not arise which would call for the imposition of even more deterrent sentences, I am prepared to take into consideration the fact that these were the first prosecutions of the kind here launched, and in the hope that further prosecutions of this kind may not be found necessary now that the law has been vindicated I

reduce the sentence to one years rigorous imprisonment in the case of the convicts Pandit Sohan Lal, Narsingh Das, Bijey-Singh, Hari Bhau Upadhya Chima Nand, Krishna Gopal, Baij Nath Mahodey, and Vaidh Ishwar Dutt.

Application rejected. Sentence reduced.

Civil Review Application No. 91 of 1930.

BEFORE MR. G C. SHANNON I. C. S.

Modu Lal son of Badri Das, (2) Ghisu Lal son of Badri Das, (3) Amar Chand son of Chand Mal, (4) Shanker Lal son of Chand Mal Malu Maheshwaries of Ajmer

Applicants.

Versus.

Mohan Lal son of Lachmi Narain Brahmin of Ajmer.

Opposite party.

Review-Grounds of-Error on the face of the record.

(a) It is no ground for review that another Judge might take a different view of the law, nor that if another opportunity were given the court might be persuaded to come to another conclusion.

(b) If a court has to go deeply into the whole record and law bearing on the case, it is not an error on the face of the record.

Limitation Statute Merely Procedural.

(c) Limitation is purely a matter of procedure or adjective law and no litigant has a vested right in procedure. If the law of limitation is changed during the pendency of a suit the new law governs the case in its further stages and not the old one.

Old courts Regulation Not merely procedural

(d) The old courts Regulation No 1 of 1877 is not merely procedural. It not only confers but also restricts the rights of appeal laid down by the Civil Procedure Code.

Right of Second Appeal.

(e) The right of second appeal is not a natural or a birth-right of a party such a right must be conferred by a statute.

(f) A statute giving or taking away a right of appeal is not merely procedural and has no retrospective effect. The pending suits are governed by the old law unless express provision is made regarding them in the new statute.

Colonial Sugar Refining Co. Vs. Irving (1905) A. C. 369 Foll.

(g) A right of appeal is a vested right which inheres in a party from the commencement of the action in the court of first instance. 1928 Lah. (A I.R) 627 F. B, 50 All. 965 F. B., 13 Cal. 86, 1927 Mad. (A. I. R) 977 F. B., 10 Bom L. R. 330, 1930 All (A I. R.) 225 F. B. 38 Mad. 101 Foll.

Appeal. Mere continuance of suit.

(h) An appeal is a mere continuance of the original proceeding initiated by the filing of the plaint.

1929 All. (A. I. R.) 756 Foll.

Date of judgement—30-10-1930.

Counsels; Messrs. V. G. Bapat and Ghisu Lal for the *Applicants.*

Messrs. Mohan Lal Capoor and Prabhu Dayal for the *Opposite Party.*

Subject Matter of the case.

Application for review under order XLVII Rule 1 Civil Procedure Code against the judgment and decree dated the 14th May 1930, passed by the Judicial Commissioner, Ajmer-Merwara, in Civil Appeal No. 51 of 1929.

ORDER

These are two review applications, Nos. 91 and 92 of 1930 against the decision of Norman J. C. recorded in Civil Second Appeals Nos. 48 and 51 of 1929.

In those appeals two preliminary points were taken. The first was that no appeal lay. That point referred to the fact that there had been cross appeals in the court of the Special Additional District Judge a single judgment was written but saparate decrees were drawn up for each appeal. The original plaintiffs filed a second appeal in respect of one decree but did not appeal against the other. At the end of the long judgment which is divided into two parts dated 10th and 12th April 1930 respectively, the learned Judicial Commissioner granted seven days within which to file an appeal against the second decree of the lower appellate Court. That finding has not been challanged in these review applications. But the further preliminary objection was taken that the second appeals did not lie to the Judical Commissioner's Court The argument was that the suit out of which they have arisen had been instituted prior to the 1st of January 1927 and consequently the forum of appeal was determined by Regulation I of 1877 and not by Regulation IX of 1926. The point was that the lower appellate court confirmed the decision of the trial court and so section 17 of the Old Regulation applies and the only remedy available to the appellants is to move the court of first appeal to draw up a statement for submission to the High Court of Allahabad. This preliminary objection was discussed at pages 6 to 11 of Mr. Norman's judgment and it was upheld and consequently he directed that the memoranda of appeals should be returned for presentation to the proper court. From that decision Modulal and others come in review.

At the same time I might mention that simultaneously with these review applications these points as to the forum of appeal and the period of limitation for the presentation of appeal were argued in connection with the second appeal No. 39 of 1930 (Seth Kalyan Mal vs. Srimati Dhanta Devi). In the review applications the point of limitation does not arise and I shall discuss that in a short judgment separately in Civil Second Appeal No. 39 of 1930.

The other point had been argued at great length and it is common to all the three cases. After very mature consideration I am of opinion that the review application must fail. In the first place I should like to deal with the preliminary objection on the broad principle that there is no error apparent on the face of the record. The whole case was argued almost *denovo* or as it was an appeal and not a review application. It is no ground for review that another Judge trying the case might have taken a different view of the law nor is it a ground for review that if the applicant were given another hearing or allowed to argue his case again he would be able to persuade the court to come to another conclusion or perhaps have secured a verdict in his favour. A Review application cannot be allowed if the court has to go deeply into the whole record and law bearing on the case.

The whole burden of the case turns on the forum of appeal and Mr. Norman following Broomfield J. C. has accepted the ruling of Chandrika Pd. Vs. B. B & C. I. Rly. (Civil Revision No. 59 of 1928) There Broomfield J. C. relying on a judgment of the Privy Council in Colonial Sugar Refining Co. vs Irving 1905 L. J. R.(P. C.) 77, held that the forum of appeal must be determined by the old Regulation and that the new Regulation of 1926, in so far as it determines the forum of appeal, is not retrospective and does not affect suits instituted before it came into operation. Mr. Norman accepted that statement of the law and therefore returned the memoranda of appeals for presentation to the proper court.

Limitation is purely a matter of procedure or adjective law and no litigant has a vested right in procedure. The law of limitation particulary speaking lays down a period within which the right of appeal or seeking revision is to be exercised and if the law had been altered during the period of pendency of the suit then the new period of limitation governs the case.

Mr. Bapat who argued the case on behalf of the applicants (or the appellant in second appeal No. 39 of 1930) endeavoured

to make out a case that the provisions of the Old Regulation of 1877 are merely procedural and that they did not confer any right of appeal, that right he contended is conferred by other laws such as the Civil Procedure Code or the Land Acquisition Act, etc. and the Ajmer Court Regulaton of 1877 acts only as a signboard or direction post indicating the forum of appeal when none is indicated by the substantive Act *i.e.* the Civil Procedure Code, Limitation Act etc. in which an appeal has to be allowed. I do not think that this is a fair or proper description of the Old Regulation, That Regulation does more than regulate the procedure. It regulates procedure up to a point for instance it lays down the Courts in which particular appeals are to be filed because the courts in this small district or province of Ajmer-Merwara are not constituted on exactly the same lines or the same scale of gradation as the courts in other parts of British India. It seems to me that the Regulation goes further than that, it goes to a point which cannot be described as purely procedureal. It very considerably restricts the amount of appeal and extent of not giving a full second appeal. It ties it down to an application to have a point of law referred to the High Court of Judicature at Allahabad, if and when the trial court and the first appellate court have come to the same decision and that cannot be called a point of procedure. It is a definite curtailment of legal right and there is nothing admittedly either in the Regulation of 1926 or the General Clauses Act *which in any way helps the present appellants in the second* appeal or the applicants in the review applications.

It is unnecessary to repeat all the arguments which have been used by Mr. Broomfield and Mr Norman in their judgments explaining and applying the rule laid down in Colonial Sugar Refining Co. vs. Irving by the Privy Council

The right of second appeal is not a natural or birth right of a party nor it can be assumed that there is a right of appeal in every matter which comes under the consideration of a judge, such right must be given by statute, or by some autho-

rity equivalent. An appeal lies only if it is expressly given by the Act. It does not lie merely by analogy to appeals in civil suits in as much as there is no inherent right of appeal where the statue does not create one. The court have to see if there was any appeal which the appellant had of right. Here a person can go to High Court of Allahabad upon a point of law stated by the first appellate court.

The decision in the case of Colonial Sugar Refining Co., vs. Irving has been followed by all the High Courts of India, Madras, Allahabad, Bombay, Calcutta and Rangoon. Mr. Norman has referred to A I.R. 1926 Rang: p. 205 which quoted the Privy Council decision. The head note reads:- "A statute giving right of appeal is not merely procedural and has not retospective effect. It does not therefore apply to pending suits." And in the Privy Council judgment Lord Macnaghten observed if the taking away of a right of appeal is not a mere matter of procedure the giving of a right of appeal is equally not such a matter. That is a very plain statement of the law. The New Regulation has given a right of appeal on the lines laid down by Section 100 Civil P. C. It was further held in A. I. R. 1928 Lah: (F.B.) p. 627 following the Privy Council judgment which I have noted above that the right of appeal is not a mere matter of procedure, but is a vested right which inheres in a party from the comencement of the action in the Court of first instance. If according to the law in force at the time when the action was started in the court of first instance the ultimate decision of such court was appelable, the right to prefer or prosecute an appeal there-from is not affected by subsequent change of the law abolishing the appeal or modifying its forum unless it is so provided expressly in the amending statue or follows by necessary implication from its terms. There is another Full Bench decision in I.L. R. 50 All. p. 965. Dealing there with the question of the New Tenancy Act the learned Judges observed that there was nothing in the new Tenancy Act expressly providing that it shall affect all pending actions, or that it shall have retrospective effect. If, therefore, the

right of appeal was a substantive right and not a mere matter of procedure, it could not be taken away by the new Act. On the other hand if it merely involved a question of procedure, that right may have been destroyed. In the opinion of the learned Bench the point is concluded by the pronouncement of their Lordships of the Privy Council in the case of the Colonial Sugar Refining Co., vs. Irving. They quoted the dictum of Lord Macnaghten that to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.

Much on the same line of the argument is the ruling reported in I. L. R. 13 Cal p. 86 There it is stated that the repealed Act with which the facts dealt excluded an appeal. It follows on the same principle, that the repealing Act cannot give an appeal unless it does so by an express form or by necessary implication.

The Full Bench of the Madras High Court whose ruling is reported in A I. R. 1927 Mad. p. 977 also followed the ruling reported in 1905 L J. R (P. C) p 77 (Colonial Sugar Refining Co vs. Irving)

The Bombay High Court took a similar view in a ruling reported in 10 B. L R. p. 330. That was a case under the Mamlatdars' Courts Act The suit was instituted in February 1906 while it was still pending the new Mamlatdars' Court Act came into operation which repealed the former Act. The suit was dismissed in January 1907. The plaintiff presented a petition for revision in March 1907 under Section 23 of the New Act. The Collector held that he had no jurisdiction to entertain the application It was held by the High Court that the repealing Act could not give the right of revision in respect of proceedings commenced under the old Act *Mutatis mutandis* that ruling applies to the present case. It was held further that on the words of the General Clauses Act, 1904, it would be wrong to hold that the Collector had jurisdication; because, so to hold would be to affect a legal proceeding in respect of a right which had accrued under the Old Act.

It would be possible to multiply rulings on the point almost indefinitely. There is a Full Bench decision of seven judges of the Allahabad High Court in A.I.R. 1930 Allahabad p. 225; at p. 230 the ruling reads, "It is clear from the authorities that a jurisdiction existing in a court can only be taken away by the use of precise and distinct words in a statue or as some authorities have held by the necessary implication of the words used." It is not a case here that concerns the taking away of jurisdiction from the Ajmer Court, but from the Allahabad High Court, and that has not been done in any way. I know as a matter of fact that one of my predecessors Barlee J. C. had addressed the Government of India on this point and no orders were passed and no amendment to the new Regulation of 1926 was effected by the Legislature. The Court that is really affected is not the Ajmer Court but the Allahabad High Court.

Another clear pronouncement of the law is to be found in A. I. R. 1929 All. p. 756. There explaning the Full Bench decision reported in I.L.R. 50 All. p. 965 Boys and Benett JJ. held that an appeal is a mere continuance of the original proceeding initiated by the filing of the plaint, and the right to continue that proceeding by way of an appeal cannot be affected by a new Act unless that Act expressly makes provision to that effect. Right of appeal is a substantive right and not a matter of procedure. Even in the ruling reported in I.L.R. 38 Mad. p. 101. that the rule regarding vested rights is not confined to substantive right but extends equally to remedial rights or rights of action including rights of appeal. In the body of the ruling at p. 105, *the law on the subject was laid down by Jessel* M. R. as follows. "It is a general rule that when the legislature alters the rights of parties by taking away or conferring any rights of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

The result therefore must be that both the review petitions be dismissed with costs which I fix at Rs. 50/- for each application.

Application Rejected.

Civil Second Appeal No. 30 of 1930.

BEFORE MR. E. H. P. JOLLY I. C. S.,

Masjid Chiragchiyan Ajmer through Majid Khan son of Rahim Khan, Shakur Mohammed son of Kallu and Kaley Khan son of Mohammed Khan Muntzim of the Masjid, of Ajmer - - *Plaintiffs-Respondents-Appellants.*

Versus.

Seth Hira Chand son of Gulab Chand Sacheti of Ajmer *Defendant-Applicant-Respondent.*

Mstt. Kallu Bibi wife of Badruddin *alias* Chhote Newab, Azim son of Qallander Khan of Ajmer Mohalla Chiragchiyan *Defendant-Respondent.*

Subject Matter of the Case.

Civil Second appeal against the judgment and decree of the Senior Sub-judge, First Class Ajmer, passed in Civil Appeal No. 15 of 1929, on the 11th December 1929.

New Courts Regulation. Second Appeal. District Judge No Jurisdiction.

(a) Under the new Courts Regulation of 1926 the District court has no longer jurisdiction to hear Second Appeals even in cases filed before its coming into force. All Second Appeals lie to the Court of the Judicial Commissioner.

Suits by rival claimants for pre-emption Articles 10 and 120 of Limitation act Application,

(*b*) A Suit against a rival claimant is not a suit for pre-emption but for substitution on the ground of a preferential right to preempt and is not governed by Article 10 of the Limitation Act. Article 120 applies to such a suit.

(*c*) When however no steps whatsoever towards preemption have been taken within a year from the date of the sale such a suit against a rival claimant is barred by time after one year.

Greater utility. No ground for preference.

(*d*) Greater utility is no ground for preemption unless a custom to the contrary is established.

Date of judgement 14-11-30.

Mr. Jasodha Nandan Advocate for the *Appellants.*

Mr. Hem Chand Sogani Advocate for the *Respondents.*

ORDER.

This is a second appeal against the decree of the Senior Sub-Judge, First Class Ajmer in Civil appeal No. 15 of 1929. The facts in brief are that plaintiffs appellants in February 1923 filed a suit for pre-emption against the vendor and vendee of certain property. While plaintiff's suit was still pending one Hira Chand also filed a suit for pre-emption against the same vendor and vendee in respect of the same property and obtained a decree in May 1924. Plaintiff thereupon with permission of the Court added Hirachand as defendant in his suit and amended his plaint so as to include a prayer for relief as against Hirachand on the ground of plaintiff's superior right of preemption. Plaintiff's suit was decreed in the trial court but on appeal by Hirachand the suit was dismissed by the Sub-Judge in appeal on the ground that the suit as against Hirachand was time barred. Plaintiff now comes to this Court in appeal.

A preliminary objection has been raised on behalf of respondent Hirachand on the ground that no second appeal lies to this Court since the procedure is governed by the old Ajmer Regulation I of 1877 under which a second appeal from the decree of a Sub-judge would lie to the Court of the Commissioner. The suit was undoubtedly filed before the introduction of the new Ajmer Courts Regulation IX of 1926 and Mr. Hemchandra's contention is that the forum for second appeal must therefore be governed by the old Reguglation Now the old Regulation was repealed by Regulation IX of 1926 which provided only one forum for second appeals viz. the court of the Judicial Commissioner and under

the present Regulation the court of the District Judge (Commissioner) is not authorised to hear second appeals. It is true that in the New Regulation no specific provision has been made for the procedure to be adopted in respect of proceedings pending at the time of the introduction of the Regulation but the forum for second appeals in certain cases has definitely been changed from the court of the Commissioner to that of the Judicial Commissioner. It is to be observed that this change does not deprive the parties to pending suits of any of their rights of appeal or other action and it is here, I think, that the position in the present case differs from that considered by my learned predecessor in Madulal's case when the question related to the right to file a second appeal. Section 17 of the old Regulation specifically disallowed a second appeal in certain cases but permitted a reference to the High court at Allahabad in certain circumstances. That is to say in the case of suit filed before the introduction of the new Regulation the parties had a right to consider certain decisions in first appeal final subject only to the above mentioned right of reference and it was held that that right could not be taken away by the introduction of the new Regulation which did not purport to have retrospective effect. In the present case there is no question of any party being deprived of the right of second appeal or of any such right being given where none existed before. The District court no longer has jurisdiction to hear second appeals and it is clear that the intention was that such appeals should after the introduction of the new Regulation lie to the court of the Judicial Commissioner only. I therefore hold that the present appeal lies to this Court.

Turning now to the question of Limitation the conclusion arrived at by the learned Sub-judge that a suit against a rival claimant for preemption would be time barred after one year from the date of sale would clealy lead to most udesirable results. It is conceivable that two rival preemptors might, as in the present case, file separate suits for pre-emption against the vendor and vendee and might each obtain a decree; if

then such decree were passed after the expiry of a year from the date of the sale there would apparently be no means of settling the claims as between the rival decree-holders for a suit by either against the other would be deemed time barred. The fallacy in the argument adopted lies, I think, in the fact that as between rival claimants for pre-emtion the suit is not really one for pre-emption but for substitution on the ground of preferential right to pre-empt. It cannot seriously be argued that the claimant who first succeeded in getting a decree against the vendor and vendee would there by acquire a superior right to possession as against the other claimant, for this would obviously open the way to collusion, example if A filed a suit for pre-emption it would be open to B a bogus claimant for pre-emption to file a suit in collusion with the vendor and vendee on the last day of the period of limitation and to rush through a consent decree and thus to defeat the bonafide claim of A. In fact a second claimant would only have to wait until the last day of the period of limitation before filing his preemption suit and the first claimant would then be deprived of any remedy as against him for a suit against him would already be time barred before the first claimant was aware that there was a rival preemptor in the field. It is clear to me therefore that the provisions of art. 10 of the Limitation Act cannot be held applicable to such a case and as stated above I do not think such a suit is strictly a suit for preemption at all; in the absence of any other provision for such a case it seems to me that art. 120 of the Limitation Act must be held to apply though it is possible that a distinction might reasonable be drawn in a case in which no steps at all towards pre-emption had been taken within a year from the date of sale for in such a case the right to pre-empt would already have been lost. For the reason given above I hold that plaintiffs suit was not barred as against Hirachand by limitation. Here I may observe that the learned Sub-Judge has dismissed pliff's suit altogether although it was only as against Hirachand that he held the suit barred, on the learned Judge's own finding plaintiff would

have been entitled to a decree against the vendor and vendee but that apparently he considered barred by the fact that Hira Chand had already obtained a decree against them though plaintiff was not a party to that suit.

Unfortunately this decision does not enable me to dispose of the suit. Plaintiffs claim as against Hirachand was for possession on the ground that plaintiff's right of pre-emption was superior to that of Hirachand but no issue on this point was framed by the trial court and I can find no ground on which the finding of either court on this point can be supported save the remark of the learned Sub-Judge that the property in question would be more useful to plaintiff than to Hirachand and in the absence of my evidence of any custom whereby utility is held to be the basis of a right of pre-emption I can not accept this as a valid ground for preferring plaintifi's claim to that of Hirachand.

I therefore remand the case to the lower court for trial of the following issue:—

(1) Does plaintiff prove that by custom or otherwise, his right of pre-emtion is superior to that of defendent Hirachand?

(2) In the event of the pre-emption rights of plaintiff and defendent Hira Chand being held equal in what way should the question of possession be decided?

Findings to be submitted within four months.

Civil Second Appeal No. 78 of 1930.

BEFORE MR. E. H P. JOLLY I. C. S.

Partab Mal son of Nathu Ram since dead by Hira Lal for self and as legal representative of his beceased father Partab Mal, Mahajan Mahesri of Ramsar *Appellant*

Versus.

(1) Ram Nand son of Ram Bilas,

(2) Ram Dhan son of Ram Bilas since dead represented by Shri Ram son of Ram Dhan Agarwals of Ramsar

Defendants, Appellants, Respondents.

Sri Lal son of Radhey Lal Mahajan Maheshwari of Nandla
Defendant-Respondent-Present Respondent

Subject Matter of the Case.

Memo of appeal under O 41 r. 1 read with section 100 Civil Procedure Code against the judgment and decree dated the 20th. February 1930, passed by the Additional District Ajmer, in Civil Appeal No. 72 of 1929.

S. 105 Civil Procedure Code—Scope.

The words "affecting the decision of the case" in Section 105 Civil Procedure Code mean affecting the merits of the case. An order setting a side abatement or an ex-parte decree is not an order affecting the merits of the case. Such an order therefore cannot be challenged in appeal within the meaning of Section 105.

56 Calcutta 21, 52 Calcutta 472, 47 Allahabad 555, 51 Bomday 495, and 6 Lahore 94 Foll.

1923 Lahore (A. I. R.) 230 dissented from.

Appeal accepted and case remanded.

Date of judgement 3rd December 1930.

Counsels: Mr. Mohan lal Capoor Advocate for the *Appellant.*

Messrs. Mithan Lal, Sri Lal and Swarup Narain for the *Respondents.*

ORDER.

The material facts of this case are that plaintiffs filed a suit against defendants 1 for redemption of two mortgages. Subsequently defendants 2 and 3 were impleaded as person

claiming interest in the mortgaged property. During the course of the suit defendant 3 died and as no application for bringing his heirs on the record was made within the prescribed time the suit abated as against that defendant. Plaintiff then filed an application for setting aside the abatement. This application was eventually allowed and the heirs of the deceased defendant having been brrught upon the recerd the suit proceeded, and a decree was passed allowing plaintiff to redeem subject to certain rights of defendants 2 and 3. Against this decree an appeal was preferred by the defendant in the court of the Additional District Judge. One of the points raised in appeal was that the court of first instance had erred *in setting aside the abatement and allowing the heirs of defen*dent 3 to be brought on the record. The court of first appeal treated this as a preliminary issue and deciding it in favour of the appellant held that the suit as a whole had abated. Against this decree the present second appeal has been preferred by plaintiff.

The only issue which arises in this appeal is whether the appellants in the first appeal were entitled to challenge the order of the court of first instance setting aside the abatement as against defendent 3. The answer to this issue depends upon the interpretation to be placed upon section [05 Civil Procedure code which porvides that where a decree is appealed from any error, defect, or irregularity in any order, affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal. Now O. 43 r. 1 provides for an appeal from an order under r. 9 of O. XXII refusing to set aside the abatement but allow no appeal against an order setting aside such abatement. The issue therefore turns upon the question whether an order setting aside abatement is an order affecting the decision of the case. The words "affecting the decision of the case" have been interpeted as meaning affecting the merits of the case and it is clear as stated in Bama Charan Das v. Gadadhar Das (56 Callcutta 21), that an order setting aside abatement or an

exparte decree is an order which far from affecting the merits of the case invites the parties to enter into the merits of the case to enable the court to come to decision upon its merits. This being so such an order cannot be challenged in appeal under the provisions of section 105 Civil Procedure Code. In addition to the case above quoted there is other authority for this propsition. The point was decided in the same sense in Sayma Bibi V. Madhusudan Mohanta (52 callcutta 472) and in Babu Ram v. Banke Behari Lal, (47 Allahabad 555.) In Dhondu Narayan v. waman Govind (51 Bombay 495) the question was whether an order setting aside an exparte decree and restoring the suit could be challenged in appeal and the principle set forth in the Allahabad case noted above was approved. The learned Additional District Judge has relied upon an obscure decision reported in A. I. R' 1923 Lahore 230. But in Sunder Singh v. Nighaiya (6 Lahore 94) where in all the previous rulings on the point have been discussed by the full Bench of the Lahore High Court it was held that such an order cannot be challenged in appeal. In view of the over-whelming volume of authority in favour of this position I hold that the first appellate court was not entitled to consider the propriety of the order setting aside the abatement.

I therfore set aside the decree and remand the appeal to the first appellate court for hearing. The court-fees on the present appeal will be refunded, other costs in this appeal to follow the event.

Civil Second appeal No. 70 of 1930.

BEFORE MR. E. H. P. JOLLY I. C. S.

Lachmi Narain son of Giani Lal Mali of Ajmer

Appellant.

Versus

Ram Chander son of Gambhir Das Sadhu Purani Mandi Ajmer *Respondent.*

Subject Matter Of The Case.

Memo of appeal under section 115 of Ajmer Regulation No. 1 of 1877 read with section 100 Civil Procedure Code against the judgement and decree dated the 31st March 1930, passed by the special Additional District Judge, Ajmer, in Civil Appeal No. 92 of 1929.

Joint family property. Question of fact.

(*a*) Whether a property is a joint family property or not is a question of fact.

Mitakshara Rights of father and manager. Hind law School Ajmer-Merwara.

(*b*) According to the interpretation of the Mitakshara in the United Provinces a co-parcener cannot alienate even his own undivided interest without the consent of the other co-parceners except for legal necessity or in the case of a father, for payment of an antecedent debt.

44 I A. 126 and 31 Allahabad 507 Foll

The rule in Bombay and Madras is different 44. Bombay, 341, 43 Bombay 472 and 25 Madras. 690 referred to.

(*c*) There is no settled rule in Ajmer-Merwara and consequently the strict interpretation abpoted by the Allahabad High Court must be followed here.

Mortgagee's Suit Burden of proving necessity or antecedency of debt.

(*d*) Even when the mortgagee has obtained a decree against the father of a joint family still in the son's suit for a declartion that the mortgage was invalid the burden is on the mortgagee to prove legal necessity or an antecedent debt

51 Allahabad 136 F. B. relied upon.

Son's Remedies

(*e*) When the creditor is thus deprived of his security of the mortgaged property - he might pursue his personal remedy for the debt, Subject to limitation and in execution there of the whole family estate is liable for its payment unless the sons prove that the debt was contracted for illegal or immoral purpose.

46 Allahabad. 95 referred to and followed.

Appeal accepted.

Date of judgement 3-12-1930.

Counsels: Mr. Ghisu Lal for the *Appellant.*
Mr. Prabhu Dayal for the *Respondent.*

ORDER

The facts of this case are briefly as follows:- Plaintiff's father Gyani Lal borrowed money from defendent Ram Chandra on the security of a mortgage of property alleged to be the joint family property of Gyani Lal and his son the plaintiff Lachmi Narain. In 1923 plaintiff filed the present suit for a declaration that the mortgage deed was illegal and in operative and for its cancellation on the ground that the debt not having been incurred for legal necessity the mortgage was not binding upon the family estate. In the Court of first instance it was held that the property was ancestral property but that legal necessity had been proved and hence the suit was dismissed. In first appeal it was held by the learned special Additional District Judge that it was not proved that the mortgage was effected for legal necessity and that the transaction was therefore not binding upon plaintiff's share of the joint property, but that it was binding upon his father Gyanilal's share; a decree was granted accordingly. Against this decree plaintiff has preferred the present appeal.

A preliminary objection to the entertaiment of the appeal has been raised on the ground that the case falls within the scope of section 17 of the Ajmer Courts Regulation of 1877 and that no appeal lies. That section however relates to the case of confirmation by the Court of first appeal of the decision of the Court of original jurisdiction and obviously has no application to the present case. The section applicable would appear to be section 15 since the decision of the original Court has been modified by the Court of first appeal on a point material to the merits of the case and it is therefore open to the Court to receive a second appeal.

It has further been urged on behalf of respondent that the property mortgaged has wrongly been held to be joint family property. This however is a question of fact on which concurrent findings have been recorded by both the lower courts and I see no reason to belive that those findings are wrong.

The sole issue raised on behalf of appellant in this appeal is whether the first appellate court was correct in holding that the mortgage was binding even upon Gyanilal's share of the joint property mortgaged. In order to clear the ground it may be observed at once that there is no suggestion that the mortgage was incurred in satisfaction of any antecedent debt and that no suit has been filed by the mortgagee on the mortgage; it may further be observed that Gyani lal himself died pendente lite.

Now under the Mitakshara system as interpreted in Bombay one coparcener is entitled to alienate for value his undivided share of the coparcenary property - Fandurany Narayan v. Bhagwandas Almaram Shah (44 Bombay 341) and where as in the present case, a coparcener purported to alienate the interest of the other coparceners also the alienation was held binding on that particular coparcener's interest—Pandu v Goma (43 Bombay 472). The same interpretation has been applied in Madras - Aiyyagari Venkataramaya v. Aiyyagari Ramaya (25 Madras 690). But in the United Provinces the Mitakshara has been otherwise interpreted and it has been held that a coparcener cannot alienate even his own undivided interest without the consent of the other coparceners, except for legal necessity, or in the case of a father, for payment of antecedent debts - Kali Shanker v. Nawal Singh (31 Allahabad 507). The proposition was stated by their Lordships of the Privy Council in the Allahabad case of Sahu Ramchandra v. Bhuji Singh (44 I. A. 126) as follows "under the law of Mitakshara the joint of family property owned as stated by all members of the family as coparceners, cannot be the subject

of a gift, sale or mortgage, except with the consent, express or implied, of all the other coparceners". In Brij Narain v. Mangal Prasad (46 Allahabad 95), also a case from the Allahabad High Court, their Lordships of the Privy Council laid down five propositions relating to the powers of a managing coparcener to alienate or burden the estate: the third runs as follows: "if he (the father) purports to burden the estate by mortgage then unless that mortage is to discharge an antecedent debt, it would not bind the estate". The learned Additonal District Judge has quoted this very case in support of his finding that the father had power to burden his own share, but he has been misled by the inaccurate report in A. I. R. 1924 Privy Council 50 where the third proposition referred to above is reported in the sense that such a mortgage would bind only the father's own interest. In Jagdish Prasad v. Hoshyar Singh (51 Allahabad 136) it was held by a full Bench of the Allahabad High Court that even where the mortgage had obtained a decree on a mortgage executed by the father of a joint family and the sons filed a suit before the the mortgage property was brought to sale for a declaration that the mortgage of the joint property was not valid, the sons were entitled to succeed if the mortgagee failed to establish legal necessity for the mortgage

There can be no doubt that the Allahabad rulings follow the strict interpretation of the Mitakshara principles relating to coparcenary property and the Bombay and Madras interpretation is a relaxation of the strict principles, which relaxation has by process of time and legal decisions developed into a settled rule in those Provinces. In the absence of any such settled rule in Ajmer-Merwara the strict interpretation adopted by the Allahabad High Court must, I think, be followed. It follows therefore that Gyanilal in the present case was not entitled to mortgage even his own share of the joint family estate since there was no antecedent debt and no legal necessity has been proved. It does not however follow that the whole transaction was void, Gyanilal was in the

circumstances not entitled to encumber the family estate and the mortgagee therefore acquired no interest in the estate by the mortgage, but his remedy against Gyanlal or the latter's legal representatives as regards the debt is only affected to the extent that he is deprived of the security of the mortgaged property. Subject to limitation it would be open to the mortgagee to pursue his personal remedy for the debt and in the event of his obtaining a decree the share not of the father only but of the sons also might be liable to be taken in execution unless the debt was shewn to have been contracted for immoral purposes.

For the reasons given above I set aside the decree of the first appellate Court and grant plaintiff a decree declaring that the mortgage deed of 12/3/23 is inoperative in so far only as it purports to encumber the joint family property. Respondent will bear appellants costs in this appeal.

Civil Second Appeal No. 76 of 1930.

BEFORE Mr. E. H. P. JOLLY I. C. S.

Minor Suja Nand desciple of Baba Amra-Nand under the guardianship of the Court of Wards Ajmer

Defendant, Appellant.

Versus.

Mool Chand son of Seho Bux Mahajan of Bhagwanpura (2) Seth Ratan Lal son of Seth Gulab Chand (3) Phool Chand son of Ghasi Ram of Pushkar (4) Chagan Lal son of Dhul-Chand Mahajan of Bagsuri *Plaintiffs,*

(5) Radhey Lal son of Jeth Mal (6) Santok Chand son of Sheo Bux Mahajan of Bhagwanpura (7) Bhura father's name not known Rawat of Samrathpura at present Bhagwanpura

Defendants, Respondents.

Subject Matter of the Case.

Memo of appeal under section 12 (c). 14 Regulation IX of 1926 read with section 100 Civil Procedure Code against the order dated the 4th April 1930, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 37 of 1930.

Court Fees. S 149 C. P. C. appeal—Scope.

(*a*) It is not obligatory upon a Court to allow time to remedy a dificiency in Court fee in the case of a memo of appeal. The concession allowed by section 149 Civil Procedure Code cannot be claimed as of right.

38 Bombay 41 dissented. 50 Allahabad 980 Foll.

Pratice - Ajmer - merwara.

(*b*) The general rule in Ajmer is to prfer the Allahabad view when there is a divergence of opinion in the different High Courts.

Appeal dismissed.

Date of judgment. 5/12/1930.

Counsel: Mr. Mithan lal Advocate for the *Appellant.*
Mr. Raghunath Agarwal Advocate for the *Respondent.*

ORDER.

The facts in this case are briefly as follows. An appeal was presented in the Court of the Additional District Judge on 27/1/30 on the last day of the period of limitation. The memo of appeal was stamped with a Rs. 2/- stamp although the proper Court fee was Rs. 18/-. The appeal was placed before the Court for orders on 14/2/30, and on that day the deficiency in Court fee was made good, by this appellant suo Moto' The learned Advocate for the appellant was subsequently called upon to show cause why the appeal should not be rejected as time barred and eventually after hearing the learned Advocate on this point the learned Additional District Judge on 4/4/30 rejected the appeal as time barred. Against this order the present second appeal has been preferred by the appellant.

On behalf of the appellant it has been argued that the Court was bound to allow appellant time to make good the deficiency in Court fee as provided in O. 7. r. 11 (c) and secondly even if the Court was not bound to allow time it had full discretion to do so under section 149 Civil Procedure Code and section 28 of the Court Fees Act, and it should have exercised this discretion in favour of the minor. With regard to the first point it was held in Achut Ramchandra Pai Versus Nagappa (38 Bombay 41) that O. 7, R. 11 (c) rendered it obligatory upon a Court to allow time to remedy a deficiency in Court fee in the case of a plaint presented with an insuffcient stamp and that by operation of section 107 (2) Civil Procedure Code a Court was equally bound to allow time in the same circumstances in the case of a memo of appeal. This view has not however been accepted by other High Courts as has been *pointed out in the judgment in* Brijbhushan versus Tola Ram (50 Allahabad 980) wherein, citing the cases reported in 1 Lahore 234, 3 Pat. L. J. 74, and 27 M. L. J. 677 it was held that the concession allowed by section 149 Civil Procedure Code cannot be claimed as of right. It certainly appears to me that to hold that the Court is bound to allow time for supplying a deficiency in Court fee when a memo of appeal is presented insufficiently stamped on the last day of the period of limitation would not only open up an easy method of defeating the provisions of the law of Limitation but would to a large degree stultify the provisions of section 149 which provide for the exercise of discretion by the Court and I can see no reason to depart from the General rule in Ajmer of preferring the rulings of the Allahabad High Court in matters on which there exists a divergence of opinion in the different High Courts, the Allahabad High Court being that which still in certain matters exercises jurisdiction in Ajmer. I therefore hold that the Court was not bound to allow the appellant time to make good the dificiency in Court fee.

Subject Matter of the Case.

Memo of appeal under section 12 (c). 14 Regulation IX of 1926 read with section 100 Civil Procedure Code against the order dated the 4th April 1930, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 37 of 1930.

Court Fees. S. 119 C. P. C. appeal—Scope.

(*a*) It is not obligatory upon a Court to allow time to remedy a dificiency in Court fee in the case of a memo of appeal. The concession allowed by section 149 Civil Procedure Code cannot be claimed as of right.

38 Bombay 41 dissented. 50 Allahabad 980 Foll.

Pratice - Ajmer - merwara.

(*b*) The general rule in Ajmer is to prfer the Allahabad view when there is a divergence of opinion in the different High Courts.

Appeal dismissed.

Date of judgment: 5/12/1930.

Counsel: Mr. Mithan lal Advocate for the *Appellant.*
Mr. Raghunath Agarwal Advocate for the *Respondent.*

ORDER.

The facts in this case are briefly as follows. An appeal was presented in the Court of the Additional District Judge on 27/1/30 on the last day of the period of limitation. The memo of appeal was stamped with a Rs. 2/- stamp although the proper Court fee was Rs. 18/-. The appeal was placed before the Court for orders on 14/2/30, and on that day the deficiency in Court fee was made good, by this appellant suo Moto. The learned Advocate for the appellant was subsequently called upon to show cause why the appeal should not be rejected as time barred and eventually after hearing the learned Advocate on this point the learned Additional District Judge on 4/4/30 rejected the appeal as time barred. Against this order the present second appeal has been preferred by the appellant.

On behalf of the appellant it has been argued that the Court was bound to allow appellant time to make good the deficiency in Court fee as provided in O. 7. r. 11 (c) and secondly even if the Court was not bound to allow time it had full discretion to do so under section 149 Civil Procedure Code and section 28 of the Court Fees Act, and it should have exercised this discretion in favour of the minor. With regard to the first point it was held in Achut Ramchandra Pai Versus Nagappa (38 Bombay 41) that O. 7, R 11 (c) rendered it obligatory upon a Court to allow time to remedy a deficiency in Court fee in the case of a plaint presented with an insufficient stamp and that by operation of section 107 (2) Civil Procedure Code a Court was equally bound to allow time in the same circumstances in the case of a memo of appeal. This view has not however been accepted by other High Courts as has been pointed out in the judgment in Brijbhushan versus Tola Ram (50 Allahabad 980) wherein, citing the cases reported in 1 Lahore 234, 3 Pat. L. J. 74, and 27 M L. J. 677 it was held that the concession allowed by section 149 Civil Procedure Code cannot be claimed as of right. It certainly appears to me that to hold that the Court is bound to allow time for supplying a deficiency in Court fee when a memo of appeal is presented insufficiently stamped on the last day of the period of limitation would not only open up an easy method of defeating the provisions of the law of Limitation but would to a large degree stultify the provisions of section 149 which provide for the exercise of discretion by the Court and I can see no reason to depart from the General rule in Ajmer of preferring the rulings of the Allahabad High Court in matters on which there exists a divergence of opinion in the different High Courts, the Allahabad High Court being that which still in certain matters exercises jurisdiction in Ajmer. I therefore hold that the Court was not bound to allow the appellant time to make good the dificiency in Court fee.

Now it is no doubt a fact that where time has been allowed for making up a deficiency in Court fee on a memo. of appeal and the deficiency is made up within the period allowed then it is immaterial that the period of limitation may have expired in the interval between the order and its fulfilment, for by the provisions of section 149 the payment takes effect as from the date of the presentation of the memo. of appeal. But in the present case there was no application for further time for supplying the deficiency in Court fee and no such time was allowed the fact being that the memo of appeal was presented on 27/1/30 with a stamp of Rs. 2/- the deficiency of Rs. 16/- being made up by appellant sue motu on 14/2/30. As no time had been allowed by the Court for making good the deficiency the provisions of section 149 Civil Procedure Code do not come into operation at àll and the eventual payment of the deficiency cannot be held to validate the insufficiently stamped memo. of appeal as from the date of its original presentation. In view of the provisions of the first clause of of section 28 of the Court Fees Act there was in fact no valid memo. of appeal until the proper Court fee was paid on 14/2/30. The proviso to section 28 of the Court Fees Act has no application in the present case for obviously there is no question of mistake or inadvertency, the learned Advocate for the appellant being well aware when he presented the memo. of appeal on 27/1/30 that the stamp there on was deficient. The Court no doubt had discretion under section 149 Civil Procedure Code to allow the appellant time to made up the deficiency at my stage but that discretion would be exercisable in favour of appellant only for good cause shown. If that discretion had been exercised in favour of appellant the memo. of appeal presented on 27/1/30 would on payment of the full Court fee, have become validated and the appeal would be within time, as that discretion was not exercised in favour of appellant the appeal was prima facie time barred as being validated only on 14/2/30 and the proper course for appellant then to have adopted was to pray condonment of the delay under section 5 of the Limitation Act. It does not

appear that any application was made for the exercise of the discretion of the Court under section 149 Civil Procedure Code indeed the deficiency in the Court fee appears to have been made good before the memo of apepal was actually placed before the Court on 14/2/30. The learned Advocate for the appellant was therefore on 19/2/30 called upon to show casue on 24/3/30 why the appeal should not be rejected as time barred He appeared on that day and was heard by the Court. The reasons put forward by him were not supported by any affidavit or other evidence and were not considered sufficient The Court therefore rejected the memo of appeal under O 7 R 11 (d) as barred by limitation. The learned Judge in his judgment referred to the judgment of this Court in Het Ram vs Madho Lal (C. S A No 4 of 1929 and C. R. No. 1 of 1930) but the point there in issue appears to me to have differred materially from that in the present case There the Court having granted time under the provisons of O. 7. r. 11 (c) and section 149 Civil Procedure Code subsequently in effect revoked this order and held the appeal barred by limitation That procedure raises issues which do not arise at all in the present case and which therefore I do not find it necessary to discuss here All that I have here to consider is whether the learned Additional District Judge erred in holding the reasons advanced on behalf of the appellant insufficient to justify condonement of the delay The reasons given were that time was required to obtain necessary money from the Court of Wards but no affidavit or other evidence was produced to show when application had been made to the Court of Wards or what time had actually been required to obtain the money; the appeal memo itself was presented only on the last day of the limitation period and in the absence of any evidence in support of the suggestion that it was impossible for the appellant to pay the Court fee of Rs. 18/- on or before 27/1/30 the decree appealed against having been passed on 5/11/29, I am not prepared to disagree with the conclusion of the learned A. D. J. that due diligence was not exercised and that there was no sufficient ground for condoning

the delay in presenting the valid memo. of appeal. The appeal is accordingly dismissed with costs.

Civil Second appeal No. 58 of 1992

BEFORE MR. E. H. P. JOLLY I. C. S.

Radha Kishen son of Madho Lal Brahmin of Ajmer
Appellant.

Versus

Duley Chand son of Gulab Chand
Mahajan of Ajmer *Respondent.*

Subject Matter of the Case.

Second Appeal against an order dated 25th. September 1929 passed by the Special Additional District Judge, Ajmer.

Possession.—Sufficient to safeguard infringement of rights.

When a person is in lawful possession of a property for a long period of years though he has not a complete legal title to it, he is entitled to protect his possession and enjoyment against infringement by an outsider.

28 Calcutta 834 Privy Council and 37 Madras 298 Foll.

Case remanded.

Date of judgment: 18/12/1930.

Counsels for the parties: Mr. G. P. Mathur for the
Appellant.

Mr. Daya Shanker for the *Respondent.*

ORDER.

Plaintiff sued for a declaration and an injunction restraining defendant from erecting a privy alleging that plaintiff was joint owner with defendant of a chabutra on which the privy was to be erected and also that the privy would constitute a nuisance. Plaintiff obtained a decree in the Court of the first

instance but in appeal this decree was reversed and the suit was dismissed on the ground that plaintiff had failed to prove his title as joint owner. Plaintiff now comes to this court in second appeal.

Plaintiff's portion of the premises originally belonged to one Lakhmichand who mortgaged it to Seth Motilal who in turn leased it to plaintiff's predecessor in title in or about the year 1888 In 1914 plaintiff predecessor in title arranged to purchase from the heirs of Lakhmichand the equity of redemption and in pursuance of this agreement paid all but Rs. 10/- of the purchase money; the remaining. 10/- was to be paid at the time of execution of the sale deed, but as the vendor disappeared no sale deed was ever executed. Subsequently plaintiff, as he alleged, paid off the mortgage. It is clear from the above fact that the plaintiff has not a complete legal title but I do not think it necessarily follows that he has no right to sue. He and his predecessor in title have admittedly been in possession for a very long period of years and he would, I think, be entitled to protect his possession and enjoyment against infringment by an outsider. That is the basis of the ruling of their Lordships of the Privy Council in Ismail Ariff v. Mahomed Ghous (20 Calcutta 834) followed in Ayyaparaju v. Secretary of State (37 Madras 298). It is not disputed that plaintiff's possession is lawful and if on the principle laid down by their Lordships in the case cited above he would be entitled to declaration that he is in lawful joint possession of the Chabutra he would presumably equally be entitled to an injunction restraining an outsider or the joint possessor from so acting as to interfere with plaintiff's joint possession and enjoyment. Plaintiff's claim for injunction appears to be based on two grounds first that the creation of the privy entails interference with the joint Chabutra and second that the privy would constitute a nuisance to plaintiff and the occupant of plaintiff's premises. Unfortuanately I am unable to discover any finding of fact on these two allegations. According to the plan produced the site of the

the delay in presenting the valid memo. of appeal. The appeal is accordingly dismissed with costs.

Civil Second appeal No. 58 of 1929

BEFORE MR. E. H. P. JOLLY I. C. S.

Radha Kishen son of Madho Lal Brahmin of Ajmer *Appellant.*

Versus

Duley Chand son of Gulab Chand Mahajan of Ajmer *Respondent.*

Subject Matter of the Case.

Second Appeal against an order dated 25th. September 1929 passed by the Special Additional District Judge, Ajmer.

Possession —Sufficient to safeguard infringement of rights.

When a person is in lawful possession of a property for a long period of years though he has not a complete legal title to it, he is entitled to protect his possession and enjoyment against infringement by an outsider.

28 Calcutta 834 Privy Council and 37 Madras 298 Foll.

Case remanded.

Date of judgment: 18/12/1930.

Counsels for the parties: Mr. G. P. Mathur for the *Appellant.*

Mr. Daya Shanker for the *Respondent.*

ORDER.

Plaintiff sued for a declaration and an injunction restraining defendant from erecting a privy alleging that plaintiff was joint owner with defendant of a chabutra on which the privy was to be erected and also that the privy would constitute a nuisance. Plaintiff obtained a decree in the Court of the first

instance but in appeal this decree was reversed and the suit was dismissed on the ground that plaintiff had failed to prove his title as joint owner. Plaintiff now comes to this court in second appeal.

Plaintiff's portion of the premises originally belonged to one Lakhmichand who mortgaged it to Seth Motilal who in turn leased it to plaintiff's predecessor in title in or about the year 1888. In 1914 plaintiff predecessor in title arranged to purchase from the heirs of Lakhmichand the equity of redemption and in pursuance of this agreement paid all but Rs. 10/- of the purchase money; the remaining. 10/- was to be paid at the time of execution of the sale deed, but as the vendor disappeared no sale deed was ever executed. Subsequently plaintiff, as he alleged, paid off the mortgage. It is clear from the above fact that the plaintiff has not a complete legal title but I do not think it necessarily follows that he has no right to sue. He and his predecessor in title have admittedly been in possession for a very long period of years and he would, I think, be entitled to protect his possession and enjoyment *against infringment by an outsider.* That is the basis of the ruling of their Lordships of the Privy Council in Ismail Ariff v. Mahomed Ghous (20 Calcutta 834) followed in Ayyaparaju v. Secretary of State (37 Madras 298). It is not disputed that plaintiff's possession is lawful and if on the principle laid down by their Lordships in the case cited above he would be entitled to declaration that he is in lawful joint possession of the Chabutra he would presumably equally be entitled to an injunction restraining an outsider or the joint possessor from so acting as to interfere with plaintiff's joint possession and enjoyment. Plaintiff's claim for injunction appears to be based on two grounds first that the creation of the privy entails interference with the joint Chabutra and second that the privy would constitute a nuisance to plaintiff and the occupant of plaintiff's premises. Unfortuanately I am unable to discover any finding of fact on these two allegations. According to the plan produced the site of the

privy appears to be on defendant's premises though in the plaint the declaration prayed for is that the defendant is not entitled to erect a privy on the Chabutra. No issue has been framed on the point whether the erection of the proposed privy would constitute an invasion of plantiff's right to the joint possession and enjoyment of the Chabutra and similarly no issue has been framed on the point of nuisance. It may be observed that even a tenant may undoubtedly claim relief in respect of an alleged private nuisance.

I find therefore that I am unable to arrive at any final conclusion in this case without findings on the following issues:—

(i) Would the erection of the privy or other works contemplated in connection therewith constitute an invasion of plantiff's right to joint possession and enjoyment of the Chabutra or staircase.

(ii) Would the erection and use of the privy constitute a nuisance to plantiff and other persons occupying plantiff's premises such as would justify the issue of an injunction in view of the provisions of section 56 (g) of the Specific Relief Act.

The case is remanded to the lower court for the recording of findings on these two issues; findings to be returned within three months.

Civil Revision Application No. 132 of 1930.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Gordhan Todi and others 52 Fatehpuria Mahajans of Ajmer. - - - - *Applicants.*

Versus.

Thakur Narsinghji through Mahant Hari Das of Ajmer
Opposite party.

Subject Matter of the Case.

Application for revision under Section 115 of the Civil Procedure Code against the order dated the 14th July 1930, passed by the Additional Districts Judge, Ajmer, in Miscellaneous Civil Appeal No. 22 of 1930.

C P Code O17 R 3.

(a) Where an order is passed directing that the suit be proceeded with exparte the decree even though passed on merits is still an exparte decree Order 17 rule 3 has no application when a defendant fails to appear.

47 All 181 Foll.

Appeal accepted, Case remanded.

Date of judgment 22-12-1930.

Counsels for the parties:—Messrs. Mohan Lal Capoor and Jasodha Nandan Advocate for the *Applicants.*

Mr. Ghisu Lal Advocate for the *Opposite party.*

ORDER.

The facts in this case are briefly as follows: The Mahant of Narsinghji Temple filed a suit to recover possession of the temple of Laxmi Narayan from the Mahajan community of Fatehpuria. After some proceedings a notice was issued by the Court under O. 1 r. 8 Civil Procedure Code and as a result 52 Additional defendants were added They appointed Mr. Suraj Karan their pleader and a copy of the plaint was served on Mr. Suraj Karan on their behalf. Mr. Suraj Karan applied for and obtained on three or four successive occasions further time for filing their written statement But as on the date finally fixed he had still received no instructions he withdrew and it was then ordered that the suit should proceed ex-parte against those 52 defendants The suit was

proceeded with and was finally decided in favour of plaintiff. The 52 defendants than applied under 9. r. 13 to have the decree against them set aside. The learned Subordinate Judge dismissed the application both on merits and apparently also on the ground that the application was not competent. The latter ground was not elaborated in his judgment but he appears to have held that the decree was not an ex-parte decree as against them. They then appealed to the Court of the Additional District Judge who dismissed the appeal on the ground that the application under O. 9 r. 13 was not competent. The applicants now applied to this court in revision.

Now I do not think there can be any reasonable doubt that the decree was, so for as the present applicants are concerned, an ex-parte decree. Orders were admittedly passed that the suit should proceed ex-parte as against the applicants when they failed to appear in order to file their written statements. There is nothing to suggest that the court purported to have acted under the provisions of O. 17 r. 3 in respect of these defendants and even if it had purported so to act the situation was clearly the one contemplated in O. 17 r. 2 and the very fact that an order was passed directing that the suit be proceeded with ex-parte as against those defendants indicates that the procedure prescribed in O. 9 r. 6 was followed Order 17 rule 3 has no application when a defendant fails to appear (47 Allahabad 181.) It follows that an application under O. 9 r. 13 was competent and the points that arise for decision are (i) whether summons was duly served and (ii) if so whether defendants were prevented by sufficient cause from appearing. As the first appellate court has not consider the case on its merits but has rejected the appeal on the ground that the lower court had no jurisdiction to entertain their application. I must set aside the order of the learned Additional District Judge and remand the appeal for a decision by him on its merits. Costs in this application to follow the event.

Miscellaneous Civil Appeal No. 85 of 1930.

BEFORE Mr. E. H. P. JOLLY I. C. S.

B. Bhagwat Sarain Master Mayo College Ajmer
Judgment-Debtor, Appellant.

Versus.

Radhey Shiam and Hari Kishen sons of Lala Shiam Sunder Lal of Rampur through Mr. Chand Karan Sarda Advocate, Ajmer *Decree-Holders, Respondents.*

Subject matter of the case.

Appeal under section 47 Civil Procedure Code against the order dated the 21st July 1930, passed by the Sub Judge, First Class, Ajmer, in execution case No. 11 of 1930.

Civil Procedure Code Section 60 clauses (h) & (i)

(*a*) The word 'salary' in clauses (*b*) of section 60 of the Civil Procedure Code means the pay of a post drawn by a man on duty, while the word 'allowance' means all that the incumbent receives in the shape of leave pay etc. while absent from duty.

(*b*) The leave pay is worked out at the average pay for the preceding 12 months and if it is less than the salary of the post it is wholly exempt from attachment under section 60 (*h*) Civil Procedure Code.

Appeal accepted.

Date of judgment 22-1-1931.

Counsels for the parties:—Mr. Mohan Lal Kapoor Advocate for the - - - - *Appellant.*

Mr. Chand Karan Sarda Advocate for the *Respondent.*

ORDER.

The only point in issue in this appeal is whether the leave *pay of the judgement-debtor is exempt from attachment under* section 60 (h) of the Civil Procedure Code. The facts are that the judgement-debtor who is a master at the Mayo College was in January 1930 drawing pay of Rs. 300/- per month. He proceeded on leave in February 1930, on average pay for 8 months and on half average pay for the next 4 months. Average pay is, under the Fundamental Rule, *calculated as the average monthly pay for the 12 months* immediately preceeding the date of the commencement of leave and in the case of the present respondent judgement-debtor the average pay worked out at Rs. 287/8/-. The question at issue is whether this leave pay of Rs. 287/8/- constitutes allowances, being less than salary as contemplated in section 60 (h) The learned Sub Judge has held average pay is the same as salary and that clause (h) only applies if the judgement-debtor is on half pay. Although such an interpretation of clause (h) might perhaps produce a result more in accordance with the effect of the provisions of clause (i) I do not think and such limitation can legitimately be read into the provision of clause (h); "salary" can, I think, only be interpreted as the salary actually drawn by the judgement-debtor when on duty i. e., the pay of the post held by him when he proceeded on leave, and "allowances" must be held to include all that the judgement-debtor receives in the shape of leave pay etc. while absent from duty; for the purpose of the section it is quite immaterial that those allowances happen to be calculated on the average monthly pay of the judgement-debtor or the preceeding 12 months, the only question is whether the allowances however calculated, are or are not less than salary, As stated above the judgement-debtor's salarly was Rs. 300/- while his allowances while on leave amounted to Rs. 287/8/- only and I think the literal interpretation of clause (h) must be followed. Otherwise it is difficult to see where the lime is to be drawn in determining

when the allowances should be attachable and when not; the learned Sub Judge has suggested that anything in excess of half would be attachable under clause (h), but the only possible grounds for such a view would be that of analogy with clause (i) Then there is nothing in clause (h) to suggest that if the "average-pay" or "allowances" in the present case had worked out at Rs. 160/-, Rs. 10/- of those allowances would have been attachable. The position is no doubt anomalous for while on duty the judgement-debtor would be liable to have his half salary, i. e.. Rs. 150/- attached, leaving him with Rs 150/- while if he proceeds on leave on average pay he draws Rs. 287/8/- none of which is liable to attachment but that seems to me to be the clear meaning of the clause. It may be observed that the provision are anomalous in another respect also for if the judgement-debtor's leave "allowances" happened to be equal to his salary the whole of such allowances would apparently be liable to attachment since exemption could be claimed neither under clause (h) nor under clause (i)

For the reasons given above the order of the lower Court is set aside and the attachment on the leave allowances of the judgement-debtor will be removed. Parties will bear their own costs in the lower court, and appellant will have his costs in this court from respondent.

Civil Revision Application No. 108 of 1930,

BEFORE MR. E. H. P. JOLLY I. C. S.

Gordhan Das Agarwal of the firm of Sheo Dayal Har Chand Rai of Ajmer : - : *Applicants.*

Versus.

B. B. & C. I. Railway through its Agent at Bombay and (2) E. I. Railway Company through its Agent at Calcutta

Opposite Party.

Subject Matter of the Case.

Application for revision under section 115 of the Civil Procedure Code against the Judgment, dated the 5th May 1930, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 35 of 1929.

Civil Procedure Code S. 151 Scope.

(a) The jurisdiction conferred by section 151 Civil Procedure Code is of a residuary nature and cannot be exercised in respect of a matter for which specific provision is made elsewhere in the Civil Procedure Code.

(b) Where no sufficient cause is shown a court has no inherent power to restore a suit dismissed for default under Section 151 Civil Procedure Code Similarly a court has no inherent jurisdiction to set aside an exparte decree otherwise than as provided by Order 9 rule 13.

48 Allahabad 175, 43 Madras 94 F. B. 1 Patna 277,

48 C. L. J. 596 Foll

34 Allahabad 426. 26 Madras 599, 44 Bombay 82, 45

Bombay 648 and 4 Rangoon 28 Dissented from.

Rivision—Jurisdiction.

(c) If a court purports in the exercise of its inherent jurisdiction to act otherwise than in accordance with the provisions of Order 9 Rule 9 or Rule 13. it must be held to have exercised a jurisdiction not vested in it by law.

Application accepted.

Date of judgment: 20/4/1931.

Counsels for the parties:—Mr. Mohan Lal Kapoor Advocate for the - - - *Applicant*

Mr. Modi for the - - - *Opponent.*

ORDER.

The facts in this case are briefly as follows: plaintiff Railway Company, brought a suit against defendant in the Court of the first Class Sub Judge Ajmer. On the date fixed for hearing neither of the two pleaders for plaintiffs appeared and the suit was dismissed for default. An application was then in filed on behalf of plaintiffs for restoration of the suit under O. 9. r. 9. Civil Procedure Code. The learned Judge, holding that sufficient cause for plaintiff non appearance on behalf of plaintiff had not been shown, dismissed the application. Against this order an appeal was preferred in the Court of the Additional District Judge. The learned additional District Judge agreed with the lower Court in holding that no reasonable sufficient cause had been shewn for the non-appearance of plaintiff on the date fixed for hearing but proceeded in exercise of his purported jurisdiction under Section 151 Civil Procedure Code to set aside the order of the Sub Judge and to restore the suit. Against this order defendants have applied to this court in revision.

Now there are concurrent findings of both the lower courts to the effect that no sufficient cause for plaintiff's non-appearance had been shown and that finding must be accepted as final and not subject to revision. The sole question before me therefore is whether in view of the provisions of o. 9. r. 9. the learned Additional District Judge acted without jurisdiction in assuming to exercise his discretion under Section 151 Civil Procedure Code. O. 9, r. 9. provides that where a suit has been dismissed for default of appearance under O. 9. r 8. no freash suit shall lie on the same cause of action, but the order of dismissal shall be set aside if plaintiff satisfies the Court that there was sufficient cause for his non-appearance. The question is whether in view of this specific provision stating the circumstances in which a suit so dismissed may be restored the Court has any jurisdiction under Section 151 to restore a suit otherwise than as provided in O. 9. r. 9. The question

has formed the subject of somewhat divergent views in the various High Courts but the trend of the latest decision is all in favour of the view that the jurisdiction conferred by Section 152 is of a residuary nature and cannot be exercised in respect of a matter for which specific provision is made elsewhere in the Civil Procedure Code.

In Lalta Prasad v. Ram Karan (34 Allahabad 426) it was held that although it is obligatory upon the court under O. 9. r. 9. to restore a suit on proof of reasonable cause for non-appearance, the Court still has discretion to restore the suit for other reasons. This was the view taken by the Madras High Court in the earlier case of Sommaya v. Subramma (26 Madras 599). These rulings were followed by the Bombay High Court in Bilassai Laxmi Narayan v. Cursondas Damodar Das (44 Bombay 82) and Sonubai v. Shivaji Rao (45 Bombay 648) and by the Rangoon High Court in Maunj Saw v. Ma Bwin Bu (4 Rangoon 18).

Subsequently however in Ram Sarup v. Gaya Prasad (48 Allahabad 175) a Bench of the Allahabad High Court held that a Court had no inherent jurisdiction to set aside an exparte decree otherwise than as provided by O. 9. r. 13, the provisions of which are in all points material to the present issue, similar to those of O. 9. r. 9. Similarly in Neelaveni v. Narayana (43 Madras 94) a Full Bench of the Madras High Court held, specifically overruling the ruling in 26 Madras 599, that a Court has no power to set aside an exparte decree in exercise of inherent jurisdiction otherwise than as provided by O. 9. r. 13. This decision was followed by the Rangoon High Court in Tun Aung Syaed v. Burma Oil Company (7 Rangoon 49) wherein it was held that in the case of a suit dismissed for default of appearance the Court has no inherent power to restore the suit otherwise than on reasonable cause shewn under O. 9. r. 9. The same view was taken by the Patna High Court in Ajodhya Mahton VS Mst. Phul Kuer (1 Patna 277) and by the Calcutta High Court

in Umesh Chandra v. Amar Nath (48 C. L. J. 596.) It is clear from these decisions that the earlier ruling of the Courts of Madras and Allahabad reported in 26 Madras 599 and 34 Allahabad 426 are no longer accepted by those High Courts and this perhaps detracts to some extent from weight to be attached to the two Bombay rulings quoted above for the attention of the learned Judges of the Bombay High Court does not appear to have been drawn to the Full Bench decision of the Madras High Court in Neeleveni v. Narayana (43 Madras 94) when the former were deciding the case of Sonubai v. Shivaji Rao (45 Bombay 648).

On behalf of opponent the case of Sorat Chandra Bose v. Biseshwar Mitra (54 Calcutta 405) has been cited, but the case has no bearing upon the present issue for it merely lays down that although where an application under O. 9. r. 9. for restoration of a suit has itself been dismissed for default no application for restoration under O. 9. r. 9. of such application will lie yet the court has inherent power to review its original order dismissing the application under O. 9. r. 9. Similarly the case of Bhgawan Prasad v Madan Murari Lal (27 Allahabad L J 1183) cited on behalf of opponent has no application for the proposition there approved was that where a Court had wrongly dismissed a suit for default of appearance when in actual fact there was a valid appearance such court had inherent jurisdiction to restore the suit.

To sum up, there is an overwhelming weight of authority in recent years in favour of the view that in view of the specific provision made in O. 9. r. 9. to meet the contingency of dismissal of a suit for default of appearance it is not open to a court virtually to extend the scope of that provision by the exercise of vague and undefined residuary jurisdication under cover of the provisions of Section 151 Civil Procedure Code O. 9. r. 9. purports to declare the circumstances in which a suit once dismissed for default may be restored, if it had been the intention of the legislature that apart from proof of

circumstances which would render restoration of the suit obligatory the court should exercise its own discretion in allowing or disallowing restoration the provision to that effect would have been made *in O. 9. r. 9.; no such provision* was made and the rule as it stands must be regarded as embodying the whole intention of the legislation in respect of the law on the particular point with which the rule deals; the rule, that is to say, is not subject to any enlargement by the exercise of the inherent jurisdiction of the Court and if a court purports in the exercise of its inherent jurisdiction to act *otherwise then in accordance with the provisions of the rule* the court must be held to have exercised a jurisdiction not vested in it by law.

I accordingly hold that the learned Additional District Judge, on finding that plaintiff had failed to show reasonable cause for his non-appearance, had no jurisdiction to restore the suit. The order is accordingly set aside and that of the court of first instance is restored. Opponent to bear applicant's costs in this Court and the District Court.

Civil Second Appeal No. 52 of 1930.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Bashir Khan adopted son of Karim Bux Kawwal of Ajmer *Appellant.*

Versus.

Mst. Rahmat Illahi deceased represented by her daughter Badrul Nisan and her sons Shafiq-Ahmed and Siraj Ahmad residing at Delhi through their General Power of attorney holder Mohamed Noor of Ajmer.......(2) Dargah Khawaja

Sahib through Khan Sahib Abdul Wahid Khan President. (3) Syed Zulfiqar Ali Member Dewanji (4) Tasaduq Hussain Member Mutawalli Sahib (5) Mohamed Hussain Khadim Sayedzadgan (6) Abdul Latif Member Sheikhzadgan.

Respondents.

Subject Matter of the Case.

Memo of appeal under Section 100 read with section 15, Regulation No. II of 1877 against the Judgment and decree dated the 19th March 1930, passed by the Special Additional District Judge Ajmer, in Civil Appeal No. 156 of 1929.

Grant Nature of Maintenance.

(*a*) The best evidence of the nature of a grant is the document itself by which the grant was made.

(*b*) A combination of an interest in land and an obligation as to service falls under three heads.

(*i*) It may be a grant of land burdened with service.

or

(*ii*) A grant in consideration of past and future services.

or

(*iii*) A grant of an office the services attached to which are remunerated by an interest in land.

In the first two classes in the absence of specific provision to that effect the grant would not be resumable at will. In the third class it would be resumable when the service ceased to be performed.

28 Bombay 305 Foll.

(*c*) Successive enjoyment for generations without interference of land granted to the original grantee for maintenance justifies the presumption that the original grant was intended to be absolute.

4 Madras 371 Foll.

Alinee—Possession—Adverse—Commencement of.

(*d*) When the hereditary manager of an estate alienates the estate, possession of the elienee becomes adverse to the manager and his successors from the date of the alienation as heritable estates could not be created to take effect as successive life estates.

23 Madras 271 P. C. Foll.

Mohamedans Adoption Custom.

(e) Adoption is a practice unknown to Mohammadan Law any custom by which it is recognised among a particular class of Mohammadans should be strictly proved.

Appeal dismissed.

Date of judgment: 27-4-1931.

Counsels for the parties: Mr. Mithan Lal Advocate for the *Appellant.*

Mr. Mohan Lal Capoor Advocate for the *Respondent.*

ORDER.

The facts in this case are briefly as follows.

In 1637 Shah Jehan granted some 17 villages to the Dargah Sharif at Ajmer and in 1648 the Emperor made a grant of 200 bighas out of one of those villages to Dana and Gyana on condition of their performing certain musical ceremonies at certain times at the Dargah. The lands thus gtanted to Gyana and Dana appear to have passed by succession ultimately to Karim Bux who on 30th November 1900 purported to sell the same to Mst. Rahmat Illahi the defendant in the present suit. Karim Bux is alleged to have died in April 1908. He had held the office of Kawwal or musician at the Durgah though he himself lived at Udaipur and the actual service of musician at the Dargah was performed by one Najju Khan. After the death of Karim Bux the present plaintiff Bashir Khan alleging himself to be the adopted son and heir of Karim Bux filed suit No. 17 of 1916 against Najju Khan and the Dargah Committee for a declaration that he was entitled as against Najju Khan to the office of Kawwal or Dargah musician on the ground that the office was heriditary in the Gyana and Dana and that he was the adopted son and heir of the last holder Karim Bux. Bashir Khan obtained a decree and was subsquently appointed to the office of Kawwal Bashir Khan then in 1920 filed the present suit to recover from defendant Mst. Rahmat Illahi the lands which she

purported to have purchased in 1900 from Karim' Bux plaintiff alleging that the lands were inalienable as having been granted as remuneration for the service of Kawwal which office was alleged to have been by the same grant, made heriditary in the family of Gyana and Dana. In the Court of first instance plaintiff's claim was decreed but in first appeal it was held by the learned Additional District Judge that they were not attached to any hereditary office in the Dargah and that they were not inalienable and the suit was accordingly dismissed. Against this decree plaintiff Bashir Khan has now appealed.

The first question for decision is the nature of the tennure of Dana and Gyana and their successors. Plaintiff's case is that the grant of 1648 operated to create an office of Kawwal heriditary in the family of Gyana and Dana, the lands in question being assigned as remuneration to the holder of that office, and that it was therefore not open to any of the successive holders to alienate either the office or the land attaching thereto. Now obviously the best evidence of the nature of the original grant was made; the original grant would by the farman itself by which the grant was made; the original farman is not on the record but plaintiff has produced an alleged copy Ex. P., this is not a certified copy, but leaving aside any possible objections to its genuineness or correctness I propose to examine its provisions since that is the document upon which plaintiff takes his stand. The material part of the translation of the document runs as follows:— "200 bighas of waste land culturable rent free.... ... .has been granted as detailed on the reverse as a source of maintenance of Dana and Gyana on the condition of performance of their duty of Kawwali at the ceremony of music on every Friday night and during the days of Urs in the blessed tomb." Then follow directions that this order should be obeyed and no recoveries in the shape of fines, begar etc. should be made from the grantees.

Now it seems to me clear that there is nothing in this order which can be construed as constituting an office of Kawwal still less an office heriditary in the family of Dana and Gyana. The grant contains no mention of heirs and successors of Dana and Gyana and no provisions for resumption, it is entirely silent as to what should happen to the land on the death of the grantees Dana and Gyaya. In accual fact the land appears to have passed by succession to their successive heirs but it does not follow from that fact that the grant was to Dàna and Gyana and their heirs, the actual fact of successior is acqually consistent with the view that the grant was an absolute grant to the original two grantees conditioned only on performance of certain personal service by those original *grantees. This to my mind is in fact what the grant purports* to be; it is expresed as a grant to Dana and Gyana personally the only condition being the performance of certain personal services at the Dargah by those two persons; there is no suggestson that the grant was for their lives only and no provision that the same service should be performed by their heirs or that after the death of Dana and Gyana the land should be held by the persons who performed the service of Kawwal. It may be observed that the service was of a personal nature and was one which required a certain degree of skill or art and then was no guarantee that the descendants of Dana and Gyana would always be capable of performing the service personally; indeed it appears that neither Karim Bux nor the present holder Bashir Khan actually performed the service personally but an officiator was appointed who apparently receives cash remuneration from the Dargah Committee. Thus the actual office of Kawwal appears to have become a sinecure and both the office and the tennure of the lands have become divorced from the actual performance of personal service as Kawwal. Even assuming that the grant created an office and assigned the lands as remmeration for the performance of the duties of such office it would be the actual officiator for the time being who would be entitled to

the lands or the profits thereof. But as stated above I do not consider that the grant can possibly be construed as creating a permanent and heriditary office for it purports to be nothing more than a personal grant to Dana and Gyana burdened with certain conditions. Whether the land was resumable or not on the death of the original grantees is now immaterial for in actual fact it passed to their heirs and so eventually to Karim Bux. Was then the tenure of these heirs also conditioned upon, or burdened with service of the nature imposed upon the original grantees Dana and Gyana. There is nothing in the grant itself to suggest that it was, the grant purports to be for the maintenance of Dana and Gyana, but not of their descendants. In Sakina Bibi v. Kanij Fatima Begum (22 C. W. N. 577) a grant of land had been made to the original grantee for maintenance and after his death to his heirs as a permanent zemindari, and it was held by their Lordships of the Privy Council that in the case of the original grantee the grant was expressed to be for his maintenance but in the case of his descendants it was not and the inference therefore was that it was not a maintenance grant in the case of the descendants and was therefore not inalienable in the hands of the latter. In the present case there was no provision of any sort with regard to the descendants and in so far as they inherited at all they must be deemed to have succeeded to an absolute estate unburdened with the conditions imposed upon the original grantees personally, and not by way of maintenance. In Lakhamgavda v. Keshav Annaji (28 Bombay 305) it was remarked by Jenkins C. J. that the combination of an interest in land and an obligation as to service may fail at least under three heads; there may be grant of land burdened with service, a grant in consideration of part and future services, or a grant of an office the services attached to which are remunerated by an interest in land : in respect of the first two classes of grants it was held that in the absence of specific provision to that effect the grants would not be resumable at will. In the case of the creation

of an office remuneration by an interest in land the remuneration would presumably be resumable when the service ceased to be performed by the holder but as stated above the present grant is not of that nature. In Salur Zemindar v. Pedda Pakir Raju (4 Madras 371) it was held that successive enjoyment for three generations without interference of land *granted to the original grantee as maintenance justifies the* presumption that the original grant was intended to be absolute. In the present case the land had been in the hands of the family of Dana and Gyana for several generations and it is sought to argue that because the land remained thus in the family from generation to generation and because successive members filled the office of Kawwal therefore the farman or original grant should be construed as having created an hereditary office of Kawwal remunerated by tenure of the lands in questions Those facts might perhaps afford ground for the proposition that the office of Kawwal had by custom become heriditary in the family of Dana and Gyana but it is patent that the grant itself makes no such provision and custom has not been pleaded either as the basis for the alleged heriditary office or as the basis of connection between the office and the tenure of the lands. As has been already remarked the tenure of the office and incidentally of the lands also, appears for many years past to have been divorced from the personal performance of the service in consideration for which the land was originally granted and there is no evidence to show that personal service was performed by the members of the family even prior to Karim Bux; it would be difficult to hold therefore that even by custom tenure of the lands was joined to the actual performance of the duties of Kawwal. I hold therefore that as there is [illegible] in [illegible] grant to suggest that tenure of the land [illegible] deatl [illegible] grantees was limited by any [illegible] th[illegible] of original grantees must be deem[illegible] [illegible] absolute and alienable estate an[illegible] Bux was therefore va[illegible]

It follows, I think from this view that the possession of the vendee has been adverse since the date of the sale since Bashir Khan can claim only as the heir of Karim Bux and not as reversioned to a life estate to whom succession had opened up only on the death of Karim Bux. In Guyanasambanda v. Velu Pandarsam (23 Madras 271) it was held by their Lordships of the Privy Council that where the heriditary manager of an estate improperly alienated the estate possession of the alienee became adverse to the manager and his successors from the date of alienation and that heritable estates could not be created to take effect as successive life estates consquently the plaintiff could claim only as heir to and from and through his father in whose time the title had been extinguished by lapse of time and adverse possession. In the present case as has already been stated there was not an estate limited in inheritance and nothing in the nature of a life interest; it was an absolute estate and defendant must I think be held to have been in adverse possession since 1900 or for about 20 years before the present suit was filed.

I do not think it necessary to dwell at length on the question of the alleged adoption of plaintiff by Karim Bux; adoption is a practice unknown to Mohamedan law and any custom by which it is recognised among a particular class of Mohamedan would require to be strictly proved I agree with the learned Additional District Judge that the rather vague flimsy evidence adduced is insfficient to prove the existence of any such ancient clear and invariable custom in the family of Dana and Gyana; indeed there is no instance of any previous adoption in the family, the only alleged instances relating to a few persons from Jodhpur

For the reasons given above I agree with conclusion arrived at by the learned Additional District Judge and dismiss the appeal with costs.

Miscellaneous Civil Application No. 45 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

R. S. P. Chandrika Prasad of Ajmer *Applicant.*

Versus.

The B. B. & C. I. Railway Company *through its Agent* at Bombay *Opposite party.*

Subject Matter of the Case.

Application for leave to appeal to His Majesty in Council against the Judgment and Decree dated the 2nd, January 1931, passed by the Judicial Commissioner, Ajmer-Merwara, in Civil Appeal No. 77 of 1930.

Civil Procedure Code. S, 110 Clauses 1 and 2. Scope of.

(*a*) The second clause of section 110 C. P. C. is to be read as an alternative to the whole of the first clause and not merely as an alternative to the second restrictions, in the first clause.

1923 Rangoon (A. I. R.) 71 distinguished.

39 Madras 843, 24 Allahabad 174 Explained.

(b) Where the decision in appeal affects an interest in property of the value of ten thousand rupees or upwards even though outside the immediate subject matter of the suit clause 2 of section 110 would apply. The criterion for the application of clause 2 is the value of the detriment to the party seeking leave arising directly or indirectly from the decision in appeal.

Leave granted.

Date of judgment 12-5-1931.

Counsels for the parties:—Mr. Mohan Lal Capoor Advocate for the *Applicant.*

Mr. V. G. Bapat Bar-at-Law for the *Opponent.*

ORDER.

This is an application for leave to appeal to his Majesty in Council against the decree of this Court in Civil second appeal No. 77 of 1930. Plaintiff sued as landlord to evict defendant as tenant on payment of compensation for improvements and obtained a decree in the Court of first instance for possession on payment of Rs. 2446-8 compensation; in the first appellate Court this decree was set aside and plaintiffs suit was dismissed; in second appeal plaintiff obtained a decree for possession on payment of Rs 5000/- as compensation and defendant was allowed six months in which to remove certain unauthorised construction in respect of which no compensation had been allowed. It is against this decreees that defendant now seeks leave to appeal to his Majesty in Council.

It is conceded by Mr. Mohan Lal on behalf of the applicant that the case does not fulfil the requirements of the first clause of section 110 Civil Procedure Code in as much as the subject matter of the suit, being for all material purposes the amount of compensation payable, did not amount to Rs 10,000/-, and even in second appeal the amount of compensation has been fixed at Rs' 5000/- only. But it is urged that the case falls within the scope of the second clause of section 110 in as much as the effect of the decree of this court is to require the defendant to remove constructions valued at over Rs. 10,000/-.

In reply to this it has been argued by. Mr. Bapat on behalf of plaintiff opponent that the second clause of Sec. 110 is to be read not as alternative to the whole of the first clause but only as an alternative to the second condition of the first clause. The first clause of Sec. 110 prescribes two conditions both of which must be fulfilled in order to bring a case within the scope of that clause that is to say (a) the value of the subject matter of the suit in the court of first instance must not be less than Rs. 10,000 and (b) the value of the subject matter in dispute on appeal to His Majesty in Council must

not be less than Rs. 10,000.' Mr. Bapat's argument is that the second clause of sec. 110 is to be read as an alternative to requirement (b) of the first clause and that requirement (a) must be fulfilled in either case. I am unable to accept such a construction of the section for it seems to me clearly opposed both to the literal interpretation to be deduced from the arrangement of the two separate clauses and also to the intention underlying the second clause; that intention appears to be to provide for cases in which although the actual subject matter of the suit and appeal may be less than Rs. 10,000 the decision involves some claim or question respecting property of that value; that is to say the decision involves some detriment to the aggrieved party of the value of Rs. 10,000 in respect of property which was not itself the actual subject matter of the suit. The case of *Moti Chand v. Ganga Prasad Singh* (24 All. 174) cited by the learned counsel for plaintiff opponent does not support the interpretation which he seems to place upon sec. 110 for all that was decided by their Lordships of the Privy Council in that case was that in order to comply with the requirements of the first clause of sec. 110 both the conditions laid down in that clause must be fulfilled there was no question of the applicability of the second clause of Sec. 110 for admittedly nothing was at stake beyond the actual subject matter of the suit. The case of Subramania Aiyar v. Sella Mal (39 Mad. 843) lays down the same principle but the judgment goes a step further in so far as the applicability of the second clause of sec. 110 is also there considered; it was held that the two clauses should be read together and that the second clause should not be interpreted in such a way as to render the first clause nugatory, that is to say the assistance of the second clause could not be invoked in cases in which the proposed appeal involved nothing but the actual subject matter of the suit or appeal for in such cases the first clause and that clause only would apply. In Maung Theve v. Chetty (A. I. R. 1923 Rangoon p. 71) the decision in Subramaniya Aiyar v. Sellamal (39 Mad. 843) has been interpreted as implying that the second clause of

Sec. 110 C. P. C. is to be read as an alternative to the second restriction in the first clause of that section and not as an alternative to the whole of the first clause. With the utmost respect I venture to think that such an interpretation goes beyond the principle actually laid down in 39 Mad. 843. What was there laid down was that if the operation of the decision is confined only to the subject matter of the suit or appeal clause 2 does not apply and in that case unless the case satisfies the conditions of clause I there is no right of appeal With that dictum I find myself in respectful agreement, but I do not think it follows that where the decision in appeal affects an interest in property outside the immediate subject matter of the suit clause 2 will not apply. Had that been the intention of the legislature we might have expected that section 110 would have been arranged differently the first clause containing the provision with regard to the value of the subject matter of the suit and then a second clause joined to the first by a conjuctive "and" the second clause containing the two alternatives with regard to the value of the subject matter in appeal and the value of some other claim or question to or respecting property directly or indirectly involved in the decree. The arrangement of the section being as it is the second clause appears to me to be designed as a recognition of the fact that the value of the subject matter of the suit or appeal is not always an indication of the actual value of the issues at stake in a particular case and the intention of the legislature being that further appeal should not be allowed as of right when the lose or gain to the parties was less than Rs. 10,000/- clause 2 appears to have been specifically designed to meet cases in which the value of the subject matter of the suit or appeal was not in fact a true measure of the actual loss or gain to the parties This view does not seem to me inconsistent with the ruling in 39 Madras 843, for the suit in that case was a money suit in which the value of the subject matter of the suit and appeal was obviously the measure of the loss or gain to the parties, that is to say there was no question of any claim in respect of

property beyond the subject matter of the suit being involved and clause 2 therefore had no application. The question to be decided therefore is whether the decree passed by this Court involves some claim or question to or respecting property additional to the actual subject matter in dispute in the appeal. Now the subject matter actually in dispute both in the suit and in the appeal is (a) the tenancy and (b) the amount of compensation for improvements. The value of the tenancy is clearly not the total value of the property and the value of the compensation has been held to be Rs. 5,000 so that the value of the subject matter is clearly less than Rs. 10,000. But in addition to the subject matter as specified above the decree involves removal of unauthorised constructions in respect of which no compensation has been allowed and if the value of these is taken into account the appealable value would undoubtedly exceed Rs. 10,000 for the total value of the construction is estimated at something over Rs. 20,000. It has been argued that as both the lower Courts recorded concurrent findings disallowing compensation for unauthorised constructions that decision is final and no further appeal would lie in respect of such constructions. But apart from the fact that the decree in first appeal was in favour of deft. who therefore could not have appealed therefrom the argument does not, I think, meet the point now in issue. The question is not whether a further appeal lies on the issue whether certain constructions were unauthorised and therefore not subject to compensation, but whether in view of the fact that defendant's possession and enjoyment of property of the value of some Rs. 20;000 is prejudiced by the decree a further appeal does not lie in respect of the whole decree whereby his position as tenant liable to eviction on payment of compensation of Rs. 5,000 has been determined. The position in the present case is perhaps somewhat complicated by the fact that compensation has been allowed in respect of certain constructions and not in respect of others and the view which I am inclined to take may perhaps be illustrated by consideration of a more simple case. Suppose that A believing himself to

be the owner of a certain plot of land builds thereon a house at a cost of Rs. 20,000; B, becoming aware of this only after completion of the building, files a suit for eviction, and succeeding in proving that A held the plot as tenant only, obtains a decree in second appeal; then although the subject matter of the suit would be merely the tenancy of the site the decree would be one affecting A's claim to the continued enjoyment of property worth Rs. 20,000 and it seems to me clear that this would be a case as is contemplated by the second clause of sec. 110 C. P. C. and that, quite apart from any question of compensation, A would be entitled to further appeal against the decree for eviction.

I have been referred to the decision in Lallubhai v. Bhima Bhai (31 Bombay L. R. 832) in which leave to appeal to his Majesty in Council was refused on the ground that the suit being in respect of an alleged easement it was immaterial that the property in respect of which the easement was claimed was valued at more than Rs. 10,000/- since for the purpose of section 110 Civil Procedure Code what was to be taken as the criterion was the detriment to the party seeking relief and the detriment arising from the declaration or refusal of the easment in question could not be valued at Rs. 10,000/-. In the present case the detriment to the applicant is the compulsory removal of buildings valued at more than Rs 10,000/-, and the detriment arises directly from the decree for eviction from the land.

For the reasons given above I hold that the present case falls within the scope of the second clause of section 110 Civil Procedure Code and that the applicant is therefore entitled to a certificate to that effect. Certificate to be issued accordingly.

The applicant should within the period prescribed in O. 45 r. 7. Civil Procedure Code deposit in Court in cash or Government securities the sum of Rs. 5,000/- as security for costs of respondent and the sum of Rs. 1,000/- to cover expenses of printing, indexing and transmitting a copy of the record to His Majesty in Council.

Civil Revision Petition No. 2 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Narain Das son of Manak Chand Sunar of Beawar *Judgment-Debtor, Applicant*

Versus.

1. Misri Mal son of Phool Chand Mahajan of Beawar (2) Chand Mal son of Nath Mal Mahajan of Beawar Decree-Holders, *Respondents and:*
(3) Hira Chand son of Ottar Mal Kanstiya of Beawar Purchaser, *Respondent, Opposite Parties.*

Subject Matter of the Case.

Applications for revision against the order of the Additional District Judge, Ajmer, passed in Misce: Civil Appeal No. 44 of 1930, on 30/8/30.

Sale. No final decree. Effect. Revision.

(*a*) The absence of a final decree for sale will not necessarily vitiate the proceedings of the court in execution leading to the sale of the property if an order for sale is passed on a notice to the judgment-debtor.

28 Calcutta 73 5 Bombay L. R. 389 and 24 Madras 695 Foll.

(*b*) In such a case it cannot be maintained in Revision that the Executing court acted without jurisdiction in ordering the sale.

(*c*) It cannot be held that a court acted irregularly in not taking into consideration an objection which was never put forward before it

Civil Procedure Code O. 21 R. 90 Scope.

(*d*) Under Order 21 rule 90 Civil Procedure Code the only ground for setting aside a sale is some material irregularity or fraud in publishing it. Non-mention of the valuation of the property in the sale proclamation is not a material irregularity.

27 A. L. J. 1228 Foll.

Application Rejected.

Date of judgment 14-5-1931.

Counsels for the parties: Mr. Moti Pershad Vakil for the *Applicant.*

Mr. Mohan Lal Capoor for the *Opponent.*

ORDER.

This is an application for revision of an order of the Additional District Judge confirming an order of the Sub Judge, Beawar dismissing objections filed under O. 21 R. 90 to the confirmation of a sale of property in execution of a decree.

In this Court certain further objections were put forward which had not been raised in either of the lower Courts and chief among these was the allegation that execution had been allowed on a preliminary decree for sale in a mortgage suit no final decree having actually been drawn up though admittedly the Court had directed the final decree to be drawn up. Although in this application I am concerned only with the regularity or legality of the dismissal of applicant's objections under O 21 r. 90 it may be observed that the absence of a final decree for sale will not necessarily vitiate the proceedings of the Court in execution; it was held in Phul Chand v. Nur Singh (28 Calcutta: 73) that it will be sufficient if there is an order for sale passed on the notice of the decree-holder and rulings to the same effect may be found in the cases reported in 5 Bombay L. R. 389 and 24 Madras 695. It cannot therefore be maintained that the Court acted without jurisdiction in ordering the sale. It is next alleged that no notice was issued to all the Judgment-debtor under O. 21 r 66; this point also was not raised in either of the lower Courts and consequently the point has not been investigated by them. The proceedings indicate that on the date on which the sale proclamation was drawn up the parties were represented by their pleaders, and in any case I cannot hold that the lower courts acted irregularly in not taking into consideration an objection which had never been put forward. The remaining objections were duly considered by the Court of first instance and rejected and the court of first appeal

confirmed the order of the original Court. The only ground upon which I am asked to interfere in revision is that the lower Courts were wrong in arriving at the conclusion that the objections were not sustainable. The issue is a very narrow one for under O. 21 r. 90 the only ground for setting aside a sale is some material irregularity or fraud in publishing it. It is true that the valuation of the property was not specified in the proclamation but I am not disposed to disagree with the lower courts in holding that this was not a material irregularity — vide Rup Kishore v. Collector of Etah (24 Allahabad: L. J. 1228) in which the ruling in Sandalmand Khan v. Phul Koer (20 Allahabad 412) is distinguished. Nor as pointed out by the learned Sub Judge does the objection that the proclamation did not state the time of the sale appear to be correct; it may be true that preliminary operations for the sale were conducted by the peon but the actual sale was conducted by the Nazir at the time specified in the proclamation. These are the only grounds of objection falling within the scope of O. 21 r. 90 and as I am not prepared to hold that these objections were wrongly over ruled by the lower Courts the present application is dismissed with costs.

Civil second appeal No. 82 of 1930.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Pahlad son of Ram Pal Sunar of Ajmer since died represented by 1. Birdhi Chand 2. Madan Lal 3. Lachmi Narain 4. Ganga Ram and 5. Dip Chand of Ajmer.

Appellants.

Versus.

Bala Pershad son of Dhanna Lal Brahmin Thekadar Shamlat Committee Thok Telian Ajmer. *Respondent.*

Section 7 of Land and Revenue Regulation.—Applicability of two towns. No adverse possession by payment of rent. Jurisdiction Section 99 C. P. C.

(*a*) A transferor cannot convey a better title than he himself possesses.

(*b*) Under section 7 of the Land Revenue Regulation an occupant of unimproved Shamlat land is a statutory tenant-at-will and mere non-payment of rent by him for many years would not constitute his possession adverse to the Shamlat.

(*c*) To constitute adverse possession there must be some definite act on the part of the tenant constituting a denial of the landlord's title.

(*d*) Section 7 of the Regulation applies equally to agricultural lands and building sites whether situate in a village or a town.

(*e*) Rent as opposed to compensation for use and occupation can only be claimed for such lands by the Shamlat from tde date of notice of demand and not for a period prior to it.

(*f*) The trial by a Sub-Judge of a suit triable by a Munsif is a mere irregularity curable by section 99 C. P. C.

2 A. M. L. J. Foll.

Date of Judgment 24th September 1931.

Counsels:—Mr. Jasodha Nandan for the *Appellants.*

Mr. Mohan Lal Capoor for *Respondent.*

Subject matter of the case.

Memo. of appeal under Section 14 of the Ajmer Courts Regulation IX of 1926 read with Section 100 Civil Procedure Code against the Judgment and Decree dated the 10th April 1930, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 26 of 1929.

Order.—This is a second appeal against a decree of the Additional District Judge Ajmer confirming a decree of the Sub Judge for arrears of rent in respect of certain sites occupied by defendants houses on Shamlat land.

It is not seriously disputed that the land was Shamlat land but defendant maintains that he had been in possession for some 40 years and had therefore acquired title. Defendant has produced sale deeds shewing his title to the houses *but it is not clear that these deeds purport to convey title to the sites, and in any case the transferor could not convey a better title than he himself possessed.* Under Section 7 of the Ajmer Land and Revenue Regulation the presumption is that the occupant of unimproved common land is a tenant-at-will of the proprietary body or Shamlat and the mere fact that no rent had been paid or demanded for very many years would not constitute the possession of the occupant adverse to the Shamlat; in order to form a starting point for the period of adverse possession there must be some definite act on the part of the tenant constituting a denial of the landlord's title and no such act or denial is alleged in the present case prior to the demand for rent in 1927. It has been argued that the provisions of Section 7 of the Land and Revenue Regulation are not intended to apply to Land in towns as opposed to villages *or to land used for non agricultural purposes;* the improvements contemplated in Section 7 certainly appear to be agricultural improvements but there is nothing in the section which would limit its application to agricultural land, the section applies to all common land in a village and I find

it difficult to draw any definite line of distinction between a village and a town for the purposes of the section. The Ajmer Municipalities Regulation makes no special provision for the occupancy of common land in areas coverd by the Regulation and as it has been held by this Court in the case reported in 2 A.M.L.J. page 23 that Section 7 of the Land and Revenue Regulation applies to towns I am not prepered to hold that the provisions of the Section have no application in the present case.

The position then is that defendent occupies the land in question as tenant-at-will of the Shamlat. It is however an admitted fact that there was no actual lease or agreement for rent and that defendant or his predecessors in title have for many years held the land without payment of rent. The suit does not purport to be one for compensation for use and occupation but for rent and as no rent purports to have been imposed by the landlord prior to the issue of notice to defendant on 8th December '27 I do not think that rent, as opposed to compensation for use and occupation, can be claimed for the period prior to that date.

A point of jurisdiction has also been raised on the allegation that the suit should have been filed in the Munsiff's Court; this is denied, but even if the Munsif had jurisdiction the Sub-Judge had concurrent jurisdiction and the trial of the suit by the Sub-Judge when he might have returned the plaint for presentation to the Court contemplated by Section 15 C. P. C. would merely be an irregularity covered by the provisions of Section 99 C.P.C.

For the reasons given above I hold that Plaintiff is entitled to arrears of rent only from the date 8-12-27 at the rate of 2 annas per month for each of the 12 sets. In modification of the decree of the lower appellate court therefore plaintiff will have a decree for Rs. 1/4/9 being rent to date of suit. As defendent unsuccessfully disputed the tenancy and plaintiff has partially succeeded parties will bear their own costs throughout.

Lower court's decree modified.

Subject matter of the case.

Memo. of appeal under Section 14 of the Ajmer Courts Regulation IX of 1926 read with Section 100 Civil Procedure Code against the Judgment and Decree dated the 10th April 1930, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 26 of 1929.

Order.—This is a second appeal against a decree of the Additional District Judge Ajmer confirming a decree of the Sub Judge *for arrears of rent in respect of certain sites occupied by defendants houses on Shamlat land.*

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A point of jurisdiction has also been raised on the allegation that the suit should have been filed in the Munsiff's Court; this is denied, but even if the Munsif had jurisdiction the Sub-Judge had concurrent jurisdiction and the trial of the suit by the Sub-Judge when he might have returned the plaint for presentation to the Court contemplated by Section 15 C. P. C. would merely be an irregularity covered by the provisions of Section 99 C.P.C.

For the reasons given above I hold that Plaintiff is entitled to arrears of rent only from the date 8-12-27 at the rate of 2 annas per month for each of the 12 sets. In modification of the decree of the lower appellate court therefore plaintiff will have a decree for Rs. 1/4/9 being rent to date of suit. As defendent unsuccessfully disputed the tenancy and plaintiff has partially succeeded parties will bear their own costs throughout.

Lower court's decree modified.

Civil second appeal No. 30 of 1930.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Masjid Chiragchiyan Ajmer.

Plaintiffs-Respondents-Appellants

Versus.

1. Seth Hira Chand and 2. Mst. Kallu Bibi of Ajmer.

Defendants-Respondents.

Pre-emption. Rival claimants. Priority of decree or larger extent of vicinage gives no preference. Section 9 of the Laws Regulation. Determination by lots.

(*a*) In the case of rival claimants for preemption the mere fact that the decree in favour of one is of a prior date gives him no preference over the others. Nor in the absence of a custom is the larger extent of vicinage a criterion for the determination of the question of priority.

(*b*) In such cases the most satisfactory way of deciding the rival claims is to cast lots on the analogy of section 9 of the Laws Regulation.

Date of Judgment 28th September 1931.

Counsels:—Mr. Jasodha Nandan for the *Appellants.*
Mr. Hem Chandra for the *Respondents.*

Subject matter of the case.

Civil Second Appeal against the Judgment and decree of the Senior Sub Judge, First Class, Ajmer passed in Civil Appeal No. 15 of 1929 on the 11th December 1929.

Judgment after remand.—The lower court has submitted its findings on the two issues sent down; it has held that plaintiff has failed to prove that he has any preferential right but that plaintiff and Hira Chand have prima-facie equal rights to pre-empt. The learned Judge further holds that in these circumstances plaintiff rather than defendant Hira Chand should be allowed to pre-empt on the ground that plaintiff's vicinage is of greater extent than that of Hira Chand.

Both parties have appeared before me with their pleader in order to argue the correctness or otherwise of these findings. That both parties had a prima-facie right to pre-empt is a point now beyond the scope of argument in this appeal and the only question is how their rival claims are to be settled as between themselves. It is clear that no custom giving the one or the other party a preferential right has been proved and I cannot accept the contention put forward on behalf of defendant Hira Chand that the mere fact that his decree for pre-emption was prior in date to that of plaintiff gives the former any preferential right. In actual fact plaintiff's suit was filed before that of Hira Chand and it was merely a matter of chance that Hira Chand's suit was decided first. Nor am I able to accept the finding of the learned Judge that in the absence of proof of any custom determining priority as between two rival pre-emptors both basing their claims on vicinage the extent of vicinage should be taken as the criterion for the determination of the question of priority. Such a criterion has admittedly no legal basis and is entirely arbitrary. In these circumstances I hold that even if the provisions of section 9 of the Ajmer Laws Regulation (III of 1877) do not apply specifically to the facts of the present case, yet the only satisfactory method of deciding the rival claims in the absence of any specific provision will be to apply the analogy of the provision of Section 9 of that Regulation to the effect that where two or more persons are equally entitled to the right the person to exercise the same shall be determined by lot. Lots were accordingly drawn in my presence and in the presence of the parties in open Court and the lot fell to plaintiff who is therefore held to be the person primarily entitled to exercise the right of pre-emption.

The decree of the lower appellate court is accordingly set aside and plaintiff will have a decree directing him to pay into Court within six weeks from the date of the decree a sum of Rs. 60/- for payment to the purchaser, on payment whereof plaintiff shall be entitled to recover possession of the p

in suit from the defendant and to his costs throughout; on failure of plaintiff to pay the above sum within the time specified plaintiff's suit will stand dismissed with costs throughout, and defendant Hira Chand shall be entitled, on payment into Court within a further period of six weeks the sum of Rs. 60/- for payment to the purchaser, to recover possession of the property in suit from the remaining defendant and to his costs in this suit throughout from plaintiff; on failure of defendant Hira Chand so to pay the sum within the time specified his claim shall stand dismissed with costs.

Appeal accepted.

Civil Revision application No. 139 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Kallu son of Rama caste Rawat of Barla. *Applicant*

Versus.

Ghisa son of Sardhara Rawat of Barla. *Opposite-Party.*

Provincial Small Cause courts Act. Scope of section 25. Power of High Court.

(*a*) *The whole object of the Provincial Small Cause Courts Act is to* provide a Comparatively cheap and speedy machinery for the disposal of small money claims. The intention of the Legislature is that ordinarily the decision by the Small Cause Court shall be final.

(*b*) Under section 25 of the Act the High Court is not intended to perform the function of a court of appeal and would not ordinarily interfere on questions of pure fact.

(*c*) The trial court is in a better position to appreciate the evidence of witnesses whom it has actually seen and heard and if the High Court interferes on a pure question of appreciation of evidence it would stultify the whole object and intention of the Act.

(*d*) Points in issue in Small Cause courts are decided on very meagre evidence and the correctness of the decision may often be open to doubt

but the mere fact that, the High Court may be inclined to arrive at a different conclusion is no ground for interference.

Date of judgment 29th September 1931.

Counsel.—Mr. Mhadeo Pershad Bar-at-law for the ... *Applicant.*

Subject Matter of the case.

Application for revision under section 25 of the Provincial Small Cause Courts Act IX of 1887 against the judgment dated the 10th September 1931, passed by the Judge Small Cause Court, Ajmer in suit No. 1879 of 1931.

Order.—Plaintiff sued on a bond for Rs. 199-12, defendant pleaded part satisfaction in the shape of repayment of six half yearly instalment of Rs. 20. Plaintiff admitted repayment of only one instalment of Rs. 20 which had been duly endorsed on the bond. The only evidence of the alleged repayment of the other five instalments was that of defendant and his two witnesses. In view of the fact that the repayment of the first instalment had been duly endorsed on the bond but that no such endorsement or other receipt was obtained by defendant in respect of the alleged subsequent repayments the learned Judge of the Small Cause Court held that the alleged subsequent repayments had not been satisfactorily proved. It is this finding that I am now asked to revise on the ground that the lower court ought to have believed defendants witnesses. Now the point at issue is one of pure fact and its decision is entirely a question of appreciation of evidence. The subject matter of Small Cause Court suits is usually a claim for money which is generally met by a denial or by a plea of satisfaction on the part of the defendant and the court has then to decide on the evidence produced whether the alleged debt existed and whether it had been satisfied. The whole object of the Provincial Small Cause Courts Act is to provide a comparatively cheap and speedy machinary for the disposal of such claims. The procedure prescribed is of a summary nature and the absence of

provision for appeal, together with the provisions of Section 27 of the Act, clearly indicate the intention that ordinarily the decision of a claim by the Small Cause Court shall be final. It is true that revisional powers are reserved to the High Court under section 25 but I wish to emphasis that in exercising those powers the High Court will not, and is not intended to, perform the function of a Court of appeal and will not therefore ordinarily interfere on questions of pure fact. Not only is the trial court in a better position to appreciate the evidence of witnesses whom it has actually seen and heard, but for the High Court to interfere on such grounds would be to stultify the whole object and intention of the Act which as stated above is designed to procure a speedy and final settlement of claims within the jurisdiction of Small Cause Courts. In fact if revisional applications are to be allowed on questions of pure fact the High Court would in effect be committed virtually to rehearing every case in which one party or the other considered himself aggrieved and for all purposes of practical utility the Small Cause Courts might just as well not exist except as a machinery for recording evidence. The points in issue frequently have to be decided in the Small Cause Courts on very meagre evidence and the correctness of the eventual descision may often be open to doubt, but the mere fact that the High Court or Judicial Commissioner might on the evidence have been inclined to arrive at a different conclusion is no ground for interference in revision. I have deemed it necessary to record these observations for it is an undoubted fact that in Ajmer-Merwara a great deal of time and money is wasted in fruitless and hopeless applications for revision in Small Cause Court decrees on questions of appreciation of evidence. In the present case I find no ground on which I can legitimately interfere in revision and the application is accordingly dismissed.

Application rejected

Civil Revision Application No. 118 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Hindu son of Kishna and 2. Sadul son of Hindu Gujars. of Akhri *Applicants.*

Versus.

Moti Lal son of Champa Lal Mahajan of Surana. *Opposite Party.*

Sections 5 and 25 of the Courts Regulation 1 of 1877 and Sections 9 and 19 of the Courts Regulation IX of 1926.

(*a*) Where the jurisdiction of Sub Judges and Munsiffs has been defined by the Chief Commissioner under section 7 of Regulation IX of 1926 the Commissioner has no power to limit such jurisdiction under section 25 of the same Regulation.

27 Cal. 272 Foll.

(*b*) But under section 5 of Regulation 1 of 1877 power to define such jurisdiction was not specifically reserved to the Chief Commissioner and consequently sections 5 and 25 of that Regulation must be read together and construed in a non contradictory sense If follows therefore that under section 25 of that Regulation the Commissioner had power to define the local limits of jurisdiction of the various Sub Judges and Munsiffs in the District and these courts can therefore exercise jurisdiction only within the local limits so defined.

Date of Judgment 10th October 1931

Counsel:—Mr. Parbhu Dayal, Advocate for the *Applicant.*

Subject Matter of the case.

Application for revision under Section 115 Civil Procedure Code against the order dated the 17th August 1931, passed by the Additional District Judge, Ajmer-Merwara, in Civil Appeal No. 23 of 1931.

Order.—This is an application for revision of ... the Additional District Judge in appeal co...

provision for appeal, together with the provisions of Section 27 of the Act, clearly indicate the intention that ordinarily the decision of a claim by the Small Cause Court shall be final. It is true that revisional powers are reserved to the High Court under section 25 but I wish to emphasis that in exercising those powers the High Court will not, and is not intended to, perform the function of a Court of appeal and will not therefore ordinarily interfere on questions of pure fact. Not only is the trial court in a better position to appreciate the evidence of witnesses whom it has actually seen and heard, but for the High Court to interfere on such grounds would be to stultify the whole object and intention of the Act which as stated above is designed to procure a speedy and final settlement of claims within the jurisdiction of Small Cause Courts. In fact if revisional applications are to be allowed on questions of pure fact the High Court would in effect be committed virtually to rehearing every case in which one party or the other considered himself aggrieved and for all purposes of practical utility the Small Cause Courts might *just as well not exist except as a machinery for recording* evidence. The points in issue frequently have to be decided in the Small Cause Courts on very meagre evidence and the correctness of the eventual descision may often be open to doubt, but the mere fact that the High Court or Judicial Commissioner might on the evidence have been inclined to arrive at a different conclusion is no ground for interference in revision. I have deemed it necessary to record these observations for it is an undoubted fact that in Ajmer-Merwara a great deal of time and money is wasted in fruitless and hopeless applications for revision in Small Cause Court decrees on questions of appreciation of evidence. In the present case I find no ground on which I can legitimately interfere in revision and the application is accordingly dismissed.

Application rejected

Civil Revision Application No. 118 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Hindu son of Kishna and 2. Sadul son of Hindu Gujars. of Akhri *Applicants.*

Versus.

Moti Lal son of Champa Lal Mahajan of Surana. *Opposite Party.*

Sections 5 and 25 of the Courts Regulation 1 of 1877 and Sections 9 and 19 of the Courts Regulation IX of 1926.

(*a*) Where the jurisdiction of Sub Judges and Munsiffs has been defined by the Chief Commissioner under section 7 of Regulation IX of 1926 the Commissioner has no power to limit such jurisdiction under section 25 of the same Regulation.

27 Cal. 272 Foll.

(*b*) But under section 5 of Regulation 1 of 1877 power to define such jurisdiction was not specifically reserved to the Chief Commissioner and consequently sections 5 and 25 of that Regulation must be read together and construed in a non-contradictory sense. If follows therefore that under section 25 of that Regulation the Commissioner had power to define the local limits of jurisdiction of the various Sub Judges and Munsiffs in the District and these courts can therefore exercise jurisdiction only within the local limits so defined.

Date of Judgment 10th October 1931

Counsel.—Mr. Parbhu Dayal, Advocate for the *Applicant.*

Subject Matter of the case.

Application for revision under Section 115 Civil Procedure Code against the order dated the 17th August 1931, passed by the Additional District Judge, Ajmer-Merwara, in Civil Appeal No. 23 of 1931.

Order.—This is an application for revision of an order of the Additional District Judge in appeal confirming an order

of the Sub-Judge, Ajmer declining in jurisdiction in a suit in respect of property situate within the territorial jurisdiction of the Senior Sub-Judge. The Subordinate Judges and Munsiffs of Ajmer-Merwara were appointed by the Chief Commissioner under Notification No. 559-C dated 31/3/14 *in exercise of the powers vested in him under Section 5 of* the Ajmer Courts Regulation 1 of 1877. Subsequently in 1923 in exercise of the powers conferred on him by Section 25 of the above mentioned Regulation the Commissioner issued a notification distributing the Civil work territorially amongst the Courts of the lowest three grades and it is an admitted fact that in accordance with that distribution the suit in question should have been filed in the Court of the Senior *Sub-judge and not in the Court of the 1st Class, Sub-Judge* Ajmer. The question at issue is whether the 1st Class, Sub-Judge was in these circumstances correct in holding that he had no jurisdiction to entertain the suit.

On behalf of applicant it is argued that the appointments made by the Chief Commissioner in his Notification No. 559 of 21/3/14 purported to appoint certain officers to be Sub-Judges and Munsiffs "in the district of Ajmer-Merwara" and that each of the officers so appointed therefore exercised jurisdiction throughout the whole of the district of Ajmer-Merwara and that such jurisdiction could not be limited by any order of the Commissioner under Section 25 of the Regulation of 1877. In support of this view is cited the case reported in 27 Calcutta 272.

Now under Section 7 of the present Ajmer Courts Regulation IX of 1926 the Chief commissioner is specifically empowered to define the local limits of the jurisdiction of Sub-Judge and Munsiffs and where jurisdiction has been so defined by the Chief Commissioner it could not be subsequently limited by the Commissioner under Section 19 of the Regulation of 1926 (which corresponds with Section 25 of the Regulation of 1877). That is the principle ennunciated in the Calcutta case quoted above. But under Section 5 of the

Regulation of 1877 power thus to define the local jurisdiction was not specifically reserved to the Chief Commissioner and Sections 5 and 25 must be read together and construed as far as possible in a non contradictory sense. In the absence of any reservation to the Chief Commissioner of power to define the local limits within which jurisdiction was to be exercised by the officers appointed by him under Section 5 as Sub-Judges and Munsiffs, Section 25 must I think be interpreted as empowering the Commissioner, subject to the control of the Commissioner, so define the local limits within which each Sub-Judge and Munsif should exercise jurisdiction. It is to be noted that the notification No. 559-C of 1914 does not purport to define the local limits of the jurisdiction of each officer but created certain officers Sub-Judges and Munsiffs in the district of Ajmer-Merwara; it does not I think follow that each of such officers was intended to exercise jurisdiction throughout the whole of the district of Ajmer-Merwara; for example it would be absured to suppose that it was intended that the Tehsildar of Beawar or Todgarh should exercise the jurisdiction of Munsif in Ajmer tehsil. In the absence of any definition of the local limits of the jurisdiction of these courts in notification No. 559-C of 1914 we have perforce to look to the orders of the Commissioner under Section 25. To hold other-wise would be to hold that the Tehsildar of Todgarh for example as Munsif would be bound to entertain a suit with in his pecunicary jurisdiction relating to property and parties in Ajmer tehsil, any orders of the Commissioner under Section 25 to the contary notwithstanding. The position at present may be different in view of the provisions of Section 7 of the Regulation of 1926 but the present arrangement was made before the Regulation of 1926 came into force and under the provisions of Section 6 of the General clauses Act the repeal of the Regulation of 1877 cannot affect acts done under that Regulation. The arrangements made by the Commissioner in 1923 under Section 25 of Regulation of 1877 therefore holds good and the order of the Additional

District Judge is in my opinion correct. The appeal is therefore summarily dismissed. The request for transfer cannot be considered in this appeal as it is not a question arising out of the order under appeal and involves questions of a nature entirely different from those a raised in appeal.

Application summarily dismissed.

Criminal application No. 25 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Nathu Singh son of Bhopal Singh Rajput resident in Chanpaneri P. S. Bhinai District Ajmer.

Accused Petitioner.

Versus.

Crown *Opposite Party.*

Evidence Act Section 30, Confession of co-accused-weight to be attached.

Section 30 of the Evidence Act provides that a court may take into consideration against an accused person a confession made by a co-accused person, the words 'may take into consideration' serve to emphasise the fact that such confessions stand in a category by themselves and do not stand on the same footing as evidence in the case. Such confessions are not statements made on oath and the accused against whom they may be taken into consideration has no opportunity to cross-examine the person making the confessions. It is obvious therefore that the weight to be attached to such confessions as against a co-accused is something less than the weight which might be attached to the evidence of an approver.

Counsels for the parties :—Mr. A. A. Zuberi for the *Applicant.*

The Public Prosecutor for the *Crown.*

Date of judgment 17th October 1931.

Subject matter of the case.

Application for revision under Section 439 Criminal Procedure Code against the order dated the 1st July 1931, passed by the additional Sessions Judge, Ajmer, in Criminal Appeal No. 47 of 1931.

Order.—This is an application for rivision of an order of the additional Sessions Judge confirming the conviction of the accused by the 1st Class Magistrate Ajmer under Sections 457 and 109 I. P. C.

The facts are that on or about the night of 9th October 1930 property worth some Rs. 1250 was stolen from the apartments of the Rani of Bhinai in the Garh at Bhinai. On 13th October some of the stolen property was produced by one Sambhir Singh and his confession was eventually recorded on 17th October. On 29th October the confession of one Bhur Singh was recorded, and eventually Sambhir Singh, Bhur Singh, one Suraj Karan and the present applicant Nathu Singh were sent up for trial and were convicted.

The evidence against the applicant Nathu Singh consists of the confession of the co-accused Sambhu Singh and Bhur Singh which have been held to be sufficiently corroborated by independent evidence.

It has been argued that the confession of Sambhu Singh and Bhur Singh should not have been admitted in evidence as there were indication that they were the result of improper influence. The circumstances in which the confessions were obtained certainly justify the suspicion that undue pressure may have been brought to bear upon the deponents. It was on 13th October that Sambhu Singh made a certain statement and disclosed the place where some of the stolen property had been hidden, but it was not until 17th October that he made a confession inplicating Nathu Singh whose name admittedly had not been mentioned by him in the first instance. The

circumstances in which Bhur Singh's confession was obtained are still more obscure; although his name was mentioned by Sambhu Singh in his confession of 17th October it is not clear when Bhur Singh was arrested for the sub Inspector deposes that Bhur Singh was brought to him on 29th by the Manager who stated that Bhur Singh had a statement to make. The statement was recorded and Bhur Singh was then taken to the Magistrate at Ajmer who recorded his confession. But assuming that these two confessins were admissible in evidence the circumstances in which they were obtained detracts very materially from their value. The confession of Bhur Singh was retracted by him at the trial and that of Sambhu Singh contained allegations against Nathu Singh which the learned additional Sessions Judge has descrided as "stuff and nonsense" and which he has held to have been put into the month of Sambhu Singh in order to darken the picture against Nathu Singh. Now if once it be conceded that certain allegations made against Nathu Singh by Sambhu Singh in the latter's confession were false and were put into the mouth of Sambhu Singh by some interested person it is obvious that the implication of Nathu Singh by Sambhu Singh at once becomes suspect. Section 30 of the Evidence Act provides that a Court may take into consideration against an accused person a confession made by a co-accused person; the words "may take into consideration" serve to emphasise the fact that such confession stand in a category by themselves and do not stand on the same footing as evidence in the case, such confessions are not statements made on oath and the accused against whom they may be taken into consideration has no opportunity to cross examine the persons making the confessions. It is obvious therefore that the weight to be attached to such confessions as against a co-accused is something less than the weight which might be attached to the evidence of an approver. In the present case in view of the circumstances in which the confessions were obtained and the fact that one of the confessions was retracted and that the

other has been held to contain false allegation with regard to Nathu Singh, I consider that the confessions are absolutely whorthless as against Nathu Singh and that in the circumscances they should not have been taken into consideration against him.

It remains only to consider the so-called corroborative evidence against Nathu Singh. The fact that Suraj Karan was seen with Nathu Singh at the garh on the evening of the alleged theft is not inconsistent with Nathu Singh's ignorance of the plot, nor is the alleged fact that on the next morning Sambhu Singh got the keys of the garh from Nathu Singh and took them to the Dewan who then opened the door and allowed Sambhu Singh to go out. The only other evidence inplicating Nathu Singh is that of certain witnesses who depose to having seen Nathu Singh in company with the other accused on the night in question but the learned Additional Session Judge has held, and I think rightly, that evidence of this type is of very little value, and has placed no reliance upon them.

None of the stolen property was traced to Nathu Singh and for the reasons given above I hold that the evidence is insufficient to prove beyond reasonable doubt that he was concerned.

The conviction and sentence recorded against Nathu Singh are accordingly set aside and his bail bond should now be discharged.

Application accepted. Conviction set aside.

Civil Revision Application No. 104 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Firm Birdhi Chand Sugan Chand through Birdhi chand son of Sugan chand Mahajan of Ajmer. *Applicant.*

Versus.

Moti Lal son of Ladhu Ram Kalal by caste cloth merchant Purani Mandı Ajmer. *Opposite Party*

Decretal amount. Fixing of instalments.

Jurisdiction of Court: Revision when lies.

(*a*) Discretion to fix instalments is a judicial discretion and failure to exercise it in a judicial manner is a valid ground for interferene in revision.

7 Lahore 293 and

11 C. L. J. 431 followed.

(*b*) Where no evidence has been adduced on the question of defendant's inability to pay, a court is not entitled to fix instalments.

Date of Judgment 16th December 1931.

Counsels for the parties.

Mr. Kaushal Das Vakil for the *Applicant*
Mr. Shyam Swarup Vakil for the *Opposite party.*

Subject Matter of the case.

Application for revision under Section 25 of the Provincial Small Cause Courts Act IX of 1887 against the Judgment dated the 24th July 1931, passed by the Judge Small Cause Court, Ajmer in suit No. 664 of 1931.

Order.—The only issue raised in this application for revision is whether the learned Judge of the Small Cause Court acted in accordance with law in allowing payment of the decretal amount by instalments. Plaintiff's claim was admitted and the learned Judge has given no reason for allowing instalment, no was any evidence adduced in the lower Court on the question of defendant's inability to pay. O.20 r. 11 provides that the court may "for any sufficient reason" order that payment be made by instalments. The discretion thus allowed to the court is a judicial discretion (Vide 7 Lahore 393) and failure to exercise the discretion in a judicial manner has been held to be valid ground for interference in revision in a small cause suit-vide Bal Gobindra-

Bhakat VS Chhedi lal Saha (11 C. L. J. 431). In the absence of any apparent reason for allowing instalments in the present case I must hold that the learned Judge has not exercised his discretion judicially and I accordingly modify the decree to the extent of setting aside that portion there of which relates to payment by instalments and by directing that the balance due under the decree be payable at once. Opponent to bear applicant's costs in this application.

Decree modified.

Miscellaneous Civil appeal No. 33 of 1931.

BEFORE MR. E. H. P. JOLLY. I. C. S.

Kajori Mal son of Chitar Mal Mahajan of Srinagar.

Plaintiff-Appellant.

Versus.

Behari Lal son of Hati Ram Brahmin of Srinagar

. *Defendant.Respondent.*

Order of abatement. Appeal against competency of.

1. The Civil Procedure Code does not contain any specific provision for the abatement of a suit or an appeal as a whole when the right to sue or appeal does not survive. Such an abatement is really in the nature of a dismissal of the suit or appeal as incompetent and amounts to decree. Consequently an appeal lies from such an order.

17 Allahabad 172 and 20 A. L. J. 214.

1 Lahore 582 Foll.

Co-parcener—death of-after decree.

No abatement of appeal as a whole.

2. All co-parceners are necessary parties in a suit on behalf of a joint family. But in an appeal from such a suit where the decree proceeds on grounds common to all the death of one of the co-plaintiffs whose legal representatives have not been brought on record does not make the appeal abate as a whole because the Appellate court has under Order 41 rule 4 Civil Procedure Code power to vary the decree in favour of even non-appealing plaintiffs.

27 Bombay 284.
25 Allahabad 27. } Foll.

A. I. R. 1927 Patna dissented from.

Counsels for the parties:—Mr. Moti Lal Malavyar for the *Appellant.*
Mr. Swarup Narain Advocate for the *Respondent.*

Date of Judgment 16th December 1931.

Subject matter of the case.

Appeal under Section 100 and O. 42 R. 1. Civil Procedure Code against the order dated the 30th July 1931, passed by the Additional District Judge, Ajmer-Merwara.

Order.—The facts in this second appeal are briefly as follows:—

Plaintiffs Hardeo and Kajori Mal sons of Chitar Mal filed a suit as muafidars of certain land for rent against the biswadar Behari lal. The main dispute was with regard to the rate at which rent was to be calculated. Plaintiffs obtained a decree for rent at a lower rate than that claimed and they then appealed against this decree. Before the appeal came on for hearing Hardeo died and no steps were taken to bring his legal representative on the record. When the appeal finally came on for hearing the learned Judge held that as the appeal could not be proceeded with by the survivor of the two co-sharers alone the appeal had abated as a whole and he passed an order accordingly. It is against this order of abatement that the present appeal has been filed.

A preliminary objection has been taken on behalf of respondent on the ground that no appeal lies against such an order and in support of this view he has quoted the case reported in 17 All. 172 which was followed in that reported in 20 A.L.J. 214. The former case was decided under the provisions of the old C.P.C. which required an actual order of abatement and it related to the legal representative of the person against whom such order of abatement had been passed. In the present case the provisions of O. 22 r. 3. of C.P.C. shew that the appeal abated automatically in respect of the deceased appellant Hardeo, on the expiry of the time allowed for bringing his legal representative ou the record, but the Code contains no specific provision for the abatement of the suit or appeal in respect of the surviving co-plaintiffs or co-appellants where the right to sue or appeal does not survive. It is the generally accepted practice to hold in such cases that the suit or appeal has abated as a whole but it appears to me that such an order is really in the nature of dismissal of the suit or appeal as incompetent in respect of the surviving plaintiffs or appellants alone and if viewed in that light the order would amount to a decree. This is the view taken by the Lahore High Court in Udmi VS Hira (1 lah. 582) and for the reasons given above I am inclined to hold that the order in the present case amounts to a decree and that this appeal is therefore competent.

It remains to consider whether the learned Judge was correct in holding that the appeal could not be proceeded with by the surviving appellant alone. It is argued on behalf of appellant that Hardeo and Kajori Mal were brothers and members of a joint Hindu family and that therefore on the death of Hardeo the right to sue survived to Kajori Mal under O. 22 r. 2. This might conceivably be the case if Kajori Mal were the sole surviving coparcener but there is no evidence that such is the fact, on the contrary I am given to understand that Hardeo has left an adult son. It is equally

clear that Kajori Mal has not been brought on the record in the capacity of legal representative of his deceased brother Hardeo or as manager of the whole joint family. The appeal has therefore clearly abated as against Hardeo and his representative and the question is whether inspite of such abatement the appeal can be proceeded with by Kajori Mal. On behalf of respondent it is urged that all co-parceners are necessary parties in a suit on behalf of a joint family as held in the cases reported in 21 Bombay 184 and 7 Bombay 217. This is no doubt correct and there is no allegation that the suit as instituted by Hardeo and Kajori Mal was not maintainable for non-joinder of necessary parties. We are however here dealing with an appeal and special provision is made in O. 41 r. 4. C. P. C. for an appeal by any one of several co-plaintiffs where the decree proceeds on grounds common to all and in such case the Court may vary the decree in favour of all the plaintiffs. In cases in which O. 41 r. 4. is applicable therefore the effect of the death of one co-appellant would apparently be that the right to appeal survives to the co-appellant under O. 22. r. 2. and r. 11 for under O. 41. r. 4. the appellate court would not be under the necessity of ascertaining the separate interests of the various plaintiffs but would be entitled to vary the decree in favour of all. This appears to be the view taken in Chintaman VS Gangabai (27 Bombay 284) and in Ram Sevak VS Lambar Pandi (25 All. 27). This aspect of the question does not appear to have been considered in the case of Kistya Nand VS Biswanath (A. I. R. 1927 Pat. 44) cited on behalf of respondent the judgment in that case proceeding upon the basis that one of two joint lessors could not sue the tenant for a specific share of the rent. In the present case the grounds upon which the decree proceeded were admittedly common to both plaintiffs and it would follow that either plaintiff would be entitled to prosecute an appeal under O. 41 r. 4. If one plaintiff lodged such an appeal it is obvious that the decision of the appeal would not be affected by the death of the other plaintiffs and if the decree

were eventually varied in appeal the representatives of the deceased plaintiff would reap the benefit equally with the actual appellant. The effect of the abatement of the present appeal as against Hardeo is that his representative are precluded from prosecuting the appeal but for the reasons given above it does not appear to me that Kajori Mal is precluded from proceeding with the appeal. The order of the lower court is accordingly set aside and the appeal in that court is remanded for decision on merits. Court fee on this appeal to be refunded other costs to follow the event.

Appeal accepted. Case remanded.

Civil First Appeal No. 37 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Qadar Bux, Abdul Razak, Wali Mohamad, Abdul Rehman, Abdul Habib sons of Badlu Kassabs. *Appellants.*

Versus.

Karim Bux, Ramzan Bux, Pir Mohamad etc of Ajmer. *Respondents.*

Regulation No. III of 1877. Custom of Pre-emption-Proof of:—

1. The burden of proving a custom of pre-emption in the Sub division in which the property is situate lies upon the plaintiff.

2 A. M. L J 23 followed.

2. A mohalla in Ajmer is a unit for the purposes of section 8 of Regulation No. 3 of 1877.

3. Evidence of a custom of pre-emption in one Mohalla is not sufficient proof of the existence of a similar custom in other Mohalla.

70 P. R 1899
67 I C 953

A. I. R. 1929 Lah. 336 Foll.

4. A single instance of pre-emption, even in conjunction with supplementary evidence afforded by instances from other Mohallas, is insufficient to prove the existence of a custom in a Mohalla.

Date of Judgment 19th December 1931.

Counsel for the parties:—Mr. Jasodha Nandan Advocate for the *Appellant.*
Mr. Daya Shanker Advocate for the *Respondent.*

Subject matter of the Case.

Memo. of appeal under Section 96 and Order XLI Rule 1 Civil Procedure Code against the Judgment and Decree dated the 15th July 1931, passed by the Treasury Officer, and Sub-Judge, 1st Class, Ajmer in suit No. 12 of 1929.

Order.—This is an appeal against a decree for pre-emption passed by the Treasury Officer and Sub Judge, 1st Class, Ajmer. The main issues in appeal are with regard to proof of custom of pre-emption and to the sale price.

As laid down by one of my learned predecessors in the case reported in 2 A. M. L. J. p. 23. the burden of proof that a custom of pre-emption prevails in the sub-division in which the property is situated is upon the plaintiff under Seetion 8 of Regulation III of 1877. The parties in the present case are Mohamedans but plaintiff's claim is not based upon any alleged right under Mahomedan Law, on the contrary he specifically pleads the existence of a custom of pre-emption in the sub-division in question and it is therefore not necessary to consider whether proof that all the parties were Mahomedans would be sufficient to discharge the burden imposed by Section 8 of the Regulation. The house in question is situated in the Ahata or Khari Kua Mohalla and it is plaintiff's case that a right of pre-emption prevails by custom in this mohalla. In support of this contention he has produced evidence of six instances of pre-emption in the shape of certified copies of judgments or decrees for pre-emption.

But of these six instances only one, Ex. P/2., relates to property situated in the mohalla in question, the others relate to property in other mohallas. Now it has been held by the Lahore High Court in a series of decisions that evidence of a custom of pre-emption in one mohalla or sub-division of a town is not sufficient proof of the existence of a similar custom in another mohalla. In Sandagan Mal VS Aman Singh (70 P. R. 1899) it was remarked that " plaintiff should never be relieved from the burden of proving the existence of the alleged custom in the special locality in which the property is situate, proof of its existence in neighbouring mohallas being at best only supplementary to the evidence required of the plaintiff". This dictum was quoted with approval in Ramji Das VS Mamchand (67 I. C. 953.) Similarly in the case of Prabhu Dial VS Bhikoo Mal it was held by the Lahore High Court that a single instance from the mohalla in question supported by instances from other mohallas was insufficient proof of custom in the mohalla in question. The insignificant value of instances from other mohallas is again noted in a more recent case reported in A. I. R. 1929 Lahore 336. In reply to this it is urged that the mohalla in question in the present suit is very small and that instances from the immediate neighbourhood should therefore be accepted as raising a pre-emption in favour of the existence of the custom in the mohalla in question. I would be prepared to concede that if a mohalla is too small to form a sub-division or unit for the purpose of Section 8 of Regulation III of 1877 evidence of instances from the immediate locality of the house in question might be accepted as evidence of the existence of the custom in that locality, but it appears from several decided cases that the mohalla in Ajmer has always been accepted as the unit for the purpose of Section 8 and Plaintiff himself pleads the existence of the custom in the mohalla in question. In actual fact plaintiffs own witness states that the mohalla comprises about 1000 houses and as to the instances given from other mohallas there is no evidence to shew that the property

was in the neighbourhood of the house now in question except that one is from the Mondri mohalla which is said to adjoin the Ahata mohalla.

The only instance from Ahata Mohalla is that of a sale in 1906 in respect of which the right of pre-emption was exercised and even in the case no issue as to the existence of a custom of pre-emption was raised. I find it impossible to accept that single instance of pre-emption within the mohalla, even in conjunction with what may be termed the supplementary evidence afforded by some half dozen instances from other mohallas as sufficiently discharging the burden of proof of existence of the custom in the Ahata mohalla as claimed by plaintiff and the decree of the lower court must therefore be set aside. *The suit is dismissed with costs throughout.*

Appeal accepted.

Civil Second Appeal No. 38 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Kan Mal and Ram Pal sons of Partab Mal, Saraogi of Ajmer. *Appellants.*

Versus.

Asa Nand and Hem Chandra Khatri, of Ajmer. *Respondents.*

Easements Act.

Invasion of rights of light and air.

1. Second appeal. Cross Objections.

A respondent in a second appeal cannot re-open issues of fact decided against him by way of filing cross-objections.

2. Every person has a right to add to or build his own premises provided he does so without material invasion of the right of his neighbours.

3. In order to justify the grant of an injunction the threatened disturbance must interfere materially with comfort of the owner. An injunction cannot be granted against disturbance of any sort without proof of substantial damage.

4. The test is laid down by Section 33 of the Easements Act and is the same as in other places where the Easements Act is not in force.

42 Calcutta 46 P. C. distinguished.

5. In such a case the court is entitled to take into consideration its own opinion formed on personal inspection of the site and base its decision on it.

Date of Judgment 7th January 1932.

Counsels for the parties :—Mr Raghu Nath Agarwala Advocate, for the *Appellant.*

Mr Shiv Narain Advocate for the *Respondent.*

Subject matter of the Case.

Appeal under Section 15 of the Ajmer Courts Regulation I of 1877 and Section 100 and order 41 rule 1, Civil Procedure Code against the Judgment and Decree dated the 17th August 1931, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 266 of 1929.

Order.—This judgment deals with two appeals Nos. 38 and 39 of 1931, against the decrees of the Additional District Judge in appeals Nos. 266 of 1929 and 6 of 1930 which were cross appeals arising out of a decree of the Sub-Judge, Ajmer. Plaintiff sued for a declaration and injunction in respect of an alleged easement of light and air with reference to nine apertures (baris or jalis) which defendant had either blocked or threatened to block. Of these baris three marked G. H. and I in the plan appertain to a room on the ground floor and six, marked K. L. M. V. W. X. appertain to a room on the first storey. Both the lower courts held it proved that all these apertures had been in existence and use for a period of more than twenty years

before suit and that plaintiff had consequently acquired an easement in respect of access of light and air through those apertures; the Court of first instance granted plaintiff the injunction sought in respect of the apertures G. H. and I but refused an injunction in respect of the other apertures; the first appellate court however held that in no case had the closing of the apertures or threatened closing resulted in, or threatened to result in, substantial damage to plaintiff and plaintiff's suit was therefore dismissed in its entirety. Plaintiff has now appealed to this Court as stated above.

The finding that all the windows or apertures have been in existence and use for a period of over twenty years before suit and that plaintiff has in consequence acquired an easement in respect of access of light and air is a finding of fact and therefore conclusive. This disposes of the cross objections filed by defendant in appeal No. 38; they are indeed not cross objections at all in the strict sense of the term for they are not objections to the decree of the lower Appellate Court but objections to certain findings of fact which appear in the judgment of the lower appellate court. It is no doubt open to the respondent to support the decree of the lower appellate court on grounds which may have been decided against him in that Court but this will not entitle him to reopen in second appeal issues of fact decided by the lower court.

The only issue which arises in these two appeals there-fore is whether in refusing an injunction the lower court has correctly applied the law by which the grant of an injunction is governed. That law is to be found in Section 35 of the Easements Act. The learned Judge while holding that there has been an infringement of the easement acquired by plaintiff has refused an injunction on the ground that the interference has not caused or would not cause to plaintiff such substantial damage as would justify the award of compensation under Section 33 of the Easements Act, that being

the test laid down in Section 35 (a) of the Act. It has been argued that under Section 35 (b) where disturbance of the easement is merely threatened it is unnecessary to prove that the threatened disturbance would cause substantial damage and that the owner of the dominant heritage is entitled to have his easement protected against disturbance of any sort irrespective of the question of damage, the extent of the right being determined by the provisions of Section 28 (c) of the Act. This, however, is an argument which I am unable to accept for it seems to me clear that in order to justify the grant of an injunction the threatened disturbance must be a material disturbance such as would interfere materially with the comfort of the owner for otherwise the owner entitled to an injunction restraining the disturbance would be in any degree of the quantity of light and air which had been accustomed to enter by the aperture in question and would be entitled for example to restrain another person from erecting a building on the distant sky line since even such a distant building would diminish, though perhaps imperceptibly, the amount of light entering by the aperture. The material question in the present case therefore is whether the closing of the apertures in suit has resulted or would result in such substantial damage to the plaintiff as is contemplated in Section 33 of the Easements Act. The lower Courts appear to have differed in their estimate of what constitutes such substantial damage for while the Court of first instance considered that the closing of the aperture G. H. and I in the ground floor room did interfere materially with the comfort of the occupants of the room the learned Additional District Judge held that it did not, and while the Court of first instance held that the closing of the apertures K. L. M. V. W. X. in the upper storey would not cause material discomfort to the occupants the Additional District Judge as a result of personal inspection was obviously inclined to hold that the closing of these apertures would render the room unsuitable for use as a living room but he

considered that he would not be justified in basing a decision on his own personal inspection and refused the injunction on the ground that plaintiff had not himself deposed that the closing of the apertures would result in such inconvenience.

I have been referred by the learned counsel for the respondent to the decision of their Lordships of the Privy Council in Paul VS Rosson (42 Calcutta 46) where in the test laid down in Colls VS Honne and Colonial Stores was followed, that is to say that the owner is entitled to a quantity of light the measure of which is what is required for the ordinary purposes of inhabitance or business of the tenement according to the ordinary notions of mankind. The Easements Act by which we are governed in Ajmer-Merwara is however not in force in Bengal and where the Act is in force the test must be that prescribed in Section 33 of the Act.

The learned Additional District Judge appears to have been greatly influenced by the fact that plaintiff did not adduce specific evidence to prove that the blocking of the apertures would result in material discomfort or prejudice to his enjoyment of his rooms and appears to have considered himself not justified in relying upon the self evident facts revealed by his own personal inspection. I myself have also inspected the premises and on referring to the evidence I find that the facts appear to be that plaintiff deposed that the two rooms in question contained only three and six apertures respectively and that all these apertures were being blocked or threatened by the defendant the obvious result being that the door would be the only remaining means of access for light and air; in order to be in a position to appreciate the exact position thus resulting the learned Judge of the trial Court made a personal inspection and all three of the successive Courts have satisfied themselves that the result of closing the apertures will be to deprive the rooms of all access of light and air except through the door; that is a fact which is not disputed and on which

therefore no further evidence is required. The only question that remains when the facts have thus been ascertained is whether such disturbance of the access of light and air through the apertures interfere materially with the comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as before. With regard to the room on the ground floor in which the apertures G. H. and I are situated plaintiff has deposed that he lets the room to tenants and the room appeared to be so occupied at the time of my inspection (of which no previous notice had been given). The door of the room opens on to a covered verandah which in turn gives on to an open courtyard some 4 yards square forming the bottom of a kind of well enclosed on all four sides by the surrounding buildings to the height of 3 or 4 storeys; the amount of light entering the room through the door when open is practically negligible and it is impossible for a person to see objects in the room without the aid of artificial light. These are plain and undisputed facts and the clos ng of the apertures G H. and I has resulted in a more or less complete deprivation of light to the room; it appears to me self evident that such a complete deprivation of light must render the room less suitable for occupation and less valuable to plaintiff for leasing to tenants and I see no reason why plaintiff should be refused all relief merely because he has omitted to state this self evident fact in so many words in his deposition.

Similarly the closing of all the apertures in the room on the first storey would result in depriving the room of all air and light save such as might enter by the door when open and the learned Additional District Judge has expressed his own opinion that the closing of the apertures would certainly render the room unsuitable for use as a living room; the only reason why he has refused plaintiff any relief is that plaintiff himself has omitted to state this self evident fact in his deposition. I cannot agree with the learned Judge that the Court was not entitled to take into consideration its

own opinion as to the effect of blocking the windows as formed on personal inspection, indeed an opinion so formed appears to me far more likely to be correct than an opinion or finding based on a mere statement by plaintiff or his witnesses that his comfort had been interfered with; what the plaintiff did in effect was to depose to the facts and invite the Court to see for itself the result. The admitted result of defendant's action is that both the rooms in question would be deprived of all access of light and air save through the door and that rooms would consequently be materially less suitable for occupancy. I consider therefore that the blocking of the apertures is such as to cause material discomfort to plaintiff in the beneficial enjoyment of the two rooms.

It remains to consider what relief should be granted. It has been urged that defendant has now built his new premises and these should not be lightly disturbed and the equities in favour of each party should be duly weighed, This building however, so far as it has operated to close the apertures in question, has all been done since the suit was filed and defendant was therefore clearly acting at his own risk. It is also suggested that to allow plaintiff to enforce his alleged rights would be tantamount to forbidding defendant the right to add to his premises by building, the obvious reply to this is that defendant has no right to build unless he can do so without material invasion of the rights of his neighbours; defendant has no right to provide himself with amenities at the expense of the amenities acquired as of right by his neighbour. Considering first the apertures G. H. and I in the room on the ground floor, these have been blocked by defendant who has erected a structure with a flat roof just above the level of the apertures; it will be possible for defendant to provide a sloping or partially sloping roof so that the three apertures may remain open to the light and air above the roof. With regard to the apertures K. L. M. V. W. X., in

the room in the upper storey the apertures K. L. M. have been blocked by the erection by defendant of an upper room abutting on the wall in question. Now I consider that the three apertures V. W. and X if left free are sufficient to provide the quantity of light and air required for the comfortable occupation of the room and that the closing of the lower three apertures K. L. M. alone would not materially affect the use of the room. I hold therefore that plaintiff is entitled to an injuction securing to him the access of light and air through the apertures G. H. I. V.W. and X.

For the reasons given above the decree of the lower court is set aside and plaintiff will have a decree with costs through out granting him a declaration and an injuction in the following terms: Plaintiff is declared to have acquired an easement in respect of access of light and air through the apertures marked G. H. I. V. W. X on the plan Ex. D/11 and defendants are enjoined not to disturb that easement by the erection of any obstructions within the space contained between the wall in which the apertures are situated and a plane projected at an angle of 45° from that wall from a base line passing through the lower extremities of the three apertures G. H. I. and V.W.X. respectively such obstructions being also within 12ft. from the wall in which the apertures are situated; defendants are further enjoined to remove any existing obstructions which project within the space so defined.

Respondent's cross objections are dismissed with costs.

Appeal Accepted.

Civil Revision Application No. 160 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Abdul Qader Khan.

Versus.

Abdul Raoof khan etc.

Reference under section 17 Ajmer Courts Regulation of 1877 in forma pauperis is competent.

(1) Provisions for Reference under section 17 Ajmer court's Regulation are not at all analogous to the provisions of Order 46 rule 1 Civil Procedure Code. There being therefore no provision in the Civil Procednre Code for such an application, Order 44 rule 1 may be deemed to cover such an application by virtue of section 32 of Ajmer Court's Regulation. A reference application consequently in forma pauperis is competent.

(2) Limitation. Exclusion of time for obtaining copies. Limitation for such an application is to be computed, after excluding time taken up in obtaining copy of judgment.

Date of Judgment 11th January 1932.

Counsel for the parties.—Mr. Abdul Rashid Advocate tor the *Applicant.*
Mr. A. A. Zuberi Vakil for the *Opposit party.*

Subject matter of the case.

Application for revision under Section 115 Civil Proceedure Code against the order dated the 14th September 1931, passed by the Additional District Judge, Ajmer in Civil Appeal No. 37 of 1927.

Order.—This is an application for revision of an order of the Additional District Judge allowing opponent to apply in forma pauperis for a reference to the High Court under Section 17 of the Ajmer Court's Regulation of 1877.

It is contended that such an application for leave to proceed in forma pauperis was not competent since provision is made in the C. P. C. for such applications only in suits or appeals (O. 33. &. O. 44) Section 17 of the Courts Regulation of 1877 however provides that for the purpose of the Court Fees Act such an application shall be deemed a memorandum of appeal, that is to say the Court fee payable on such an application will be that payable on a memorandum of appeal. This provision for reference is not at all analogous to the provision for reference made in O. 46 r. 1. of the C. P. C., it is in fact a method of procedure peculiar to Ajmer-Merwara and naturally therefore no provision with respect to this procedure is to be found in the C. P. C. for under the C. P. C. the ordinary remedy in such cases is by way of second appeal. In these circumstances I think O. 44 r. 1. of the C. P. C. must be deemed to cover the case of an application under Section 17 of the Courts Regulation of 1877, for under Section 32 of the Regulation the provisions of the C. P. C. are to be applied so far as they may be applicable; where therefore the procedure prescribed by the Regulation is a modification of that prescribed by the C. P. C. the relevant provisions of the C. P. C. must be applied subject to such modification. I would therefore hold that the application was competent.

The only other point raised is that of limitation; this point was considered and decided by the learned Judge and even an erroneous decision on a point of law will not ordinarily justify interference in revision, nor am I prepared to hold that the learned Judge was in fact wrong in allowing exclusion of the time required for obtaining copies.

The application is accordingly dismissed with costs.

Application dismissed.

Civil Revision No. 173 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Syed Abdul Aziz son of Umrao Ali Khadim of Ajmer.

Applicant.

Versus.

Chand Mal son of Sheo Chand Mahajan of Bir.

Opposite Party.

Amendment to Limitation Act. No retrospective operation. Execution petition Order for execution if not reversed in appeal, conclusive.

Order at one stage-Not resjudicata in respect of an issue raised at a late stage.

1. The amendment of the Limitation Act does not operate retrospectively, so as to validate applications which were time barred under the old law.

2. Where an order directing execution has been made on an application that order if not reversed in appeal will for the purpose of a subsequent application be conclusive about the validity of the original application. But when the execution application was struck off at the request of the decree-holder even before notice was issued to the judgment-debtor the question of the application's validity is not resjudicata in a subsequent application.

8 Calcutta 51 Distinguished.

3. There is no authority for the proposition that an order at one stage of a proceeding operates by implication as resjudicata in respect of an issue raised at a later stage of the same proceeding.

9 Patna 306 Relied upon

Date of Judgment 12th January 1932.

Counsel for parties :—Mr. Jasodha Nandan Advocate for *Applicant.*

Mr. Chunni Lal and Mr Milap Chandra for *Respondent.*

Subject matter of the case.

Application for revision under Section 25 of the Provincial Small Cause Courts Act IX of 1887 against the Judgment dated the 17th October 1931, passed by the Judge Small Cause Court, Ajmer in Execution No. 83 of 1929.

Order.—This is an application for revision of an order of Judge Small Cause Court Ajmer directing execution to proceed against the applicant in respect of a decree obtained in 1918. It is contended on behalf of the applicant that the application for execution should have been dismissed as being barred by limitation. Limitation is claimed to be saved first by reason of a previous application for execution in 1924 and secondly by reason of an order for execution in the present proceedings which order, it is suggested, operated as resjudicata. On behalf of the applicant it is contended that the application of 1924 cannot operate to save limitation as it was itself time barred and was not therefore an application presented in accordance with law. The learned Judge has apparently held that the application of 1924 was in fact time barred under the law of limitation then in force but he holds that as it would not have been time barred under the present law of limitation it should be deemed to have been presented within time for the purpose of the present proceedings; in other words he holds that the amendment to the Limitation Act operates retrospectively so as to validate previous applications which were time barred under the old law. This is, I think, clearly a proposition which cannot be sustained. the point for determination is whether the application of 1924 was an application "in accordance with law", that is to say whether it was an application which could properly have been entertained at the time when it was made and in determining that question we have obviously to be guided by the law as it stood at the time when the application was made and not by the law as altered several years later.

It has been suggested that the question of the validity of the application of 1924 is now barred on the principle of resjudicata since that application was duly registered. Now as held by their Lordships of the Privy Council in Mangal Pershad Dixit VS Girja Kant Lahiri (8 Calcutta 51) where an order directing execution has been passed on an application, that order if not reversed in appeal, will for the purpose of a subsequent application be conclusive that the original application was a valid application *i. e.* that it was not barred by time, even though the question of limitation may not have been specifically raised in such original application. In the present case however the proceedings in connection with the application of 1924 contained no such order for execution for the application was struck off at the request of the decree holder before notice even had been issued to the judgment debtor. The question of limitation was then never raised in the proceedings of 1924 either specifically or even by implication and there is nothing in those proceedings which can operate as resjudicata on the point of limitation so far as it relates to those proceedings.

Coming now to the present application we find that it was only after two or three appearances on the part of the judgment-debtor and after the issue of an order for execution in the shape of a warrant for his arrest that he raised for the first time the objection based on grounds of limitation. Admittedly the present application would be time barred if the previous application of 1924 was time barred and as stated above there is nothing in the proceedings of 1924 to operate as a bar to the raising of the question of the validity of the application of 1924 in the present subsequent application. The only other ground upon which applicant is alleged to be precluded from raising the question of limitation is that he raised the objection at a late stage in the present proceedings and after an order for execution in the shape of a warrant for his arrest had been issued. It is suggested that order for execution operates as a bar to the raising of the question of

limitation at any subsequent stage of the same proceedings. Obviously there is no direct analogy with the provisions of section II Civil Procedure Code which contemplate two separate proceedings described as "former" and "subsequent" proceedings, nor can I find any authority for the proposition that an order at one stage of a proceedings operates by implication as resjudicata in respect of an issue raised at a later stage of the same proceeding. Under Section 3 of the Limitation Act the court is bound to dismiss the proceeding if it appears that it has not been instituted within the prescribed period of limitation and as held in Atul Krishna Ghosh VS Brindaban Naik (9 Pat. 306) in the absence of anything to show that the objection on the ground of limitation was taken and disallowed in an earlier execution proceeding, or that the earlier execution proceeding reached a stage at which the *judgment-debtor could have taken that objection* the judgment-debtor is entitled to resist the execution on the ground of limitation in the subsequent proceedings even though at an earlier stage in those proceedings an order for execution may have been issued by the Court.

As the learned Judge has held that the application af 1924 was not an application in accordance with the law in force at that time that application cannot form the basis of a fresh starting point for the purpose of the period of limitation and the present application is thus barred by time. The order of the lower court is accordingly set aside and the application for execution is dismissed with costs throughout.

Application accepted.

Civil Revision application No. 161 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

M. Abdul Salam son of Mirza Adil Beg and 2. M. Karam Ghani Khan son of M. Abdul Ghani Khan Secretaries of the Nazire-Aukaf Committee, Ajmer.

Applicants.

Versus.

S. Nisar Ahmad son of Mir Hafiz Ali Mutwalli Durgah Khwaja Sahib Ajmer. *Opposite Party.*

Section 10 of the Musalman Wakf Act. District Court-Jurisdiction of.

A failure to file accounts amounts to an offence under section 10 of the Musalman Wakf Act within the meaning of the Criminal Procedure Code. Consequently the District court has no power to punish for such a failure which can only be done by a Magistrate after a due trial in accordance with the provisions of the Criminal Procedure Code.

A. I. R. 1930 All. 81. not followed.

A. I. R. 1928 Sind 43. relied upon.

Date of judgment 12th January 1932.

Counsel for the parties:—Mirza Abdul Qader Beg Vakil for the *Applicant.*
Mr. Abdul Rashid Advocate for the *Opposite Party.*

Subject matter of the case.

Application for revision under Section 115 Civil Procedure Code against the order dated the 16th July 1931, passed by the Additional District Judge, Ajmer in Civil suit No. nil of nil.

Order.—This is an application for revision of an order of the Additional District Judge, refusing to take action under Section 10 of the Musalman Wakf Act (XLII of 1923) against the Mutwalli of the Durgah Khwaja Sahib, Ajmer for his failure to file the accounts prescribed by Sections 3 and 5 of that act. The learned Judge has based his refusal on the ground that the Wakf Act does not apply to the institution in question and I am asked to interfere in revision on the ground that this conclusion is wrong.

But before that question can be considered I find that there is a preliminary question which must be decided, and that relates to the jurisdiction of the Additional District Judge to take action under Section 10 of the Wakf Act. The Section itself is silent as to the Court or other authority entitled to inflict the punishment prescribed by the Section, and there is

little or no indication in the section itself to show whether the authority was intended to be vested in a civil or in a criminal Court. I have been referred to a case reported in A. I. R. 1930 All. p. 81. (Nassullah Khan VS Wajid Ali) wherein it is clearly suggested that the District Court would have authority to proceed under Section 10 of the Act, but those remarks can only be regarded as obiter dicta for that particular question was never in issue, the only issue before the Court being whether a Court had jurisdiction under the Act to order a Mutwali to file the accounts prescribed by Sections 3 and 5 of the Act; in holding that the act conferred no such jurisdiction the learned judges remarked incidentally that the District Court though it could not order accounts to be filed could no doubt punish under Section 10 of the Act failure' to do so. This seems to me by no means so certain; under Section 3 (37) of the General Clauses Act " Offence " is defined as any act or omission made punishable by any law for the time being in force and a similar definition is given in Section 4 (0) of the Criminal Procedure Code. It is clear therefore that the omission made punishable with fine under Section 10 of the Wakf Act constitutes an " offence " as contemplated by the Code of Criminal Procedure; this being so the question of jurisdiction is governed by Section 29 of the Code of Criminal Procedure which provides that in the case of offences under any law other than the Indian Penal Code the Courts exercising jurisdiction shall be (a) the Court mentioned in that behalf in the Act in question or (b) if no such Court is mentioned in the Act then either the High Court or the Court mentioned in the eighth column of the second schedule of the Code of Criminal Procedure; that is to say, in the present case, the court of a Magistrate. This was the view taken by the learned Judicial Commissioner of Sind in a case reported in A. I. R. 1928 Sind p. 43 and inconvenient as the conclusion may be it appears to me unassailable for there is nothing in the Wakf Act itself or in any other Act to invest the District Court with jurisdiction to try an " Offence " under Section 10

of the Wakf Act. In the absence of any provision to the contrary it must be presumed that the "punishment" is intended to be inflicted only after due trial in accordance with all the requirements of the law of Criminal procedure and prima-facie the civil Courts would have no jurisdiction to try the case or to inflict the punishment.

For the reason given above I must hold that the learned Judge was right in refusing to take action under Section 10 of the Wakf Act although his refusal was based on different grounds. It has been suggested that I should nevertheless pronounce upon the question of the applicability of the provisions of the Musalman Wakf Act of 1923 to the case of Durgah Khwaja Sahib of Ajmer but I find it impossible to do so since I have held that the civil Court has no jurisdiction to take proceedings under Section 10 of the Act; any expression of opinion on that particular point in the present proceedings would therefore be unauthoritative and merely calculated to prejudice the decision of the issue when, if at all, it comes up for trial before a competent Court.

For the reasons given above the application is dismissed with costs.

Application dismissed.

Criminal appeal No. 1 of 1932.

BEFORE MR. E. H. P. JOLLY I. C. S.

Balu son of Dhanna Rawat of Kheri *Accused Appellant.*

Versus.

Crown. *Complainant.*

Evidence Act Section 27 Confession Insufficient to base a conviction on.

(a) In order to decide whether a statement is admissible under section 27 of the Evidence Act it is necessary to know the exact words used otherwise it is difficult to know whether the alleged discovery of fact was made in consequence of the information so conveyed.

(b) The principle underlying section 27 Evidence Act is that the actual discovery of a fact is in itself a material guarantee of the truth of the particular information which led to the discovery.

(c) Such a statement alone is not sufficient to support a conviction.

Decided on 16th January 1932.

Counsel for the parties:—Mr. B. D. Khanna Vakil for the *Appellant.*
K. B. Abdul Wahid Khan Advocate for the *Respondent.*

Subject matter of the case.

Appeal against the order dated the 2nd January 1932 passed by the Additional Sessions Judge, Ajmer in Sessions Case No. 15 of 1931.

Order.—The accused has been convicted of the murder of one Salu and has been sentenced to be hanged. Practically the only evidence against the accused is an alleged admission or confession made by him some 15 days after the offence. He is then alleged to have admitted that he had killed the deceased with an axe the blade of which he offered to produce and the handle of which he said he had burnt. This confession was, it is suggested made to the assembled villagers but the Police Sub-Inspector was admittedly present and the Sub Inspector himself admits that it was while he was examining the accused that the latter produced the axe and said that he had killed Salu with it. There can therefore be little doubt that the so called confession was made in effect to the police and it is therefore inadmissible in evidence with the exception of such portion of the statement as might be admissible under Section 27 of the Evidence Act. We have no evidence of the actual statement made by the accused however,

of the Wakf Act. In the absence of any provision to the contrary it must be presumed that the "punishment" is intended to be inflicted only after due trial in accordance with all the requirements of the law of Criminal procedure and prima-facie the civil Courts would have no jurisdiction to try the case or to inflict the punishment.

For the reason given above I must hold that the learned Judge was right in refusing to take action under Section 10 of the Wakf Act although his refusal was based on different grounds. It has been suggested that I should nevertheless pronounce upon the question of the applicability of the provisions of the Musalman Wakf Act of 1923 to the case of Durgah Khwaja Sahib of Ajmer but I find it impossible to do so since I have held that the civil Court has no jurisdiction to take proceedings under Section 10 of the Act; any expression of opinion on that particular point in the present proceedings would therefore be unauthoritative and merely calculated to prejudice the decision of the issue when, if at all, it comes up for trial before a competent Court.

For the reasons given above the application is dismissed with costs.

Application dismissed.

Criminal appeal No. 1 of 1932.

BEFORE MR. E. H. P. JOLLY I. C. S.

Balu son of Dhanna Rawat of Kheri

Accused Appellant.

Versus.

Crown. *Complainant.*

Evidence Act Section 27 Confession Insufficient to base a conviction on.

(a) In order to decide whether a statement is admissible under section 27 of the Evidence Act it is necessary to know the exact words used otherwise it is difficult to know whether the alleged discovery of fact was made in consequence of the information so conveyed.

(b) The principle underlying section 27 Evidence Act is that the actual discovery of a fact is in itself a material guarantee of the truth of the particular information which led to the discovery.

(c) Such a statement alone is not sufficient to support a conviction.

Decided on 16th January 1932.

Counsel for the parties :—Mr. B. D. Khanna Vakil for the *Appellant.*
K. B. Abdul Wahid Khan Advocate for the *Respondent.*

Subject matter of the case.

Appeal against the order dated the 2nd January 1932 passed by the Additional Sessions Judge, Ajmer in Sessions Case No. 15 of 1931.

Order.—The accused has been convicted of the murder of one Salu and has been sentenced to be hanged. Practically the only evidence against the accused is an alleged admission or confession made by him some 15 days after the offence. He is then alleged to have admitted that he had killed the deceased with an axe the blade of which he offered to produce and the handle of which he said he had burnt. This confession was, it is suggested made to the assembled villagers but the Police Sub-Inspector was admittedly present and the Sub Inspector himself admits that it was while he was examining the accused that the latter produced the axe and said that he had killed Salu with it. There can therefore be little doubt that the so called confession was made in effect to the police and it is therefore inadmissible in evidence with the exception of such portion of the statement as might be admissible under Section 27 of the Evidence Act. We have no evidence of the actual statement made by the accused however,

one witness states that accused said that he would produce the axe with which he had committed the offence while the Sub-Inspector states that while he was examining the accused the latter produced an axe and said that he had killed Salu with it. In order to decide whether a statement is admissible under Section 27 of the Evidence Act it is necessary to know the words used otherwise it is difficult to know whether the alleged discovery of fact was made in consequence of the information so conveyed. The only facts discovered in the present case were an axe head and a piece of charred ground neither of which have any special significance unless we admit the whole explanation or confession given by the accused, for there is no independent evidence to connect these two facts with the crime. The principle underlying Section 27 of the Evidence Act is that the actual discovery of a fact is in itself a material guarantee of the truth of the particular information which led to that discovery, but only of so much of the [illegible] tion as was necessary to lead to the discovery and [illegible] tion of the axe head by the accused is not any [illegible] truth of his alleged statement that he had kille[illegible] with it. The production of the axe head cann[illegible] peg upon which to hang the whole alleged con[illegible] accused on the ground that it was in conseq[illegible] confession that the axe was brought to light. In [illegible] I do not see that the production of the axe [illegible] accused carries the case against him very much f[illegible] absence of any independent evidence to connect [illegible] with the crime. Of independent evidence against [illegible] there is practically none to connect him with the [illegible] evidence of the boys Chitar and Choga merely [illegible] accused armed with an axe came to Chitar's field [illegible] of the occurrence when Chitar raised an outcry [illegible] were coming; the learned Judge attaches significan[illegible] evidence as shewing that accused was out on the ni[illegible] crime, but there was nothing unusual in accused being o[illegible] his field at night or in his coming t[illegible] Chitar's field when the latter admittedly raised an outcry.

The evidence of Rama that he saw accused rubbing an axe head on the morning after the crime is of a type to which little value can be attached, obtained as it was only after accused had been arrested some 15 days after the occurrence of the crime. There is indeed no evidence to connect the accused with the crime except his statement made to the Sub-Inspector and even assuming that certain portions of that statement are admissible in evidence, though the exact statement made has not been proved, I cannot hold that such evidence is sufficient to support a conviction. No attempt was apparently made to have the confession of the accused recorded by a Magistrate and I find it impossible to place reliance upon even such portions of the alleged confession to the police as might be held admissible. I agree with the unanimous opinion of the assessors that the evidence is insufficient to prove the guilt of the accused. The conviction and sentence recorded by the lower Court are accordingly set aside and the accused is acquitted and should be set at liberty.

Appeal accepted.

Civil Second Appeal No. 24 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Ratan lal son of Phul Chand Mahajan of Ajmer

Appellant.

Versus.

Moti Lal son Dhanna Lal Mahajan of Ajmer.

Want of Territorial and pecuniary Jurisdiction.

Suit to set aside decree when lies.

A separate suit to set aside a decree passed by a court without territorial jurisdiction is maintainable because there is a lack of jurisdiction *ab-initio* but no suit would lie on the ground of want of pecuniary juri-diction

alone. The reason being that an error in valuation of a suit does not oust the jurisdiction of the court to decide that point and will not necessarily result in the decree in that suit being set aside as a nullity under section 11 of the suits valuation Act by an Appellate court even if the decision is wrong.

22 A .L. J. 120 Relied upon.

Decided on 16th January 1932.

Counsel for the parties.—

Messrs. Mithan Lal and Jasodha Nandan,for the *Appellants.*

Mr. Raghu Nath for the *Respondent.*

Subject matter of the Case.

Memo of appeal under Section 100 Civil Procedure Code read with Section 14 of the Ajmer Court's Regulation against the Judgment and decree dated the 27th July 1931, passed by the Additional District Judge, Ajmer, in Misce: Civil Appeal No. 40 of 1931.

Order. The only issue raised in this second appeal is whether a suit lies to set aside a decree on the ground that the suit in which the decree was passed was undervalued and that had the suit been correctly valued it would have been beyond the pecuniary jurisdiction of the Court. Plaintiff sued to evict two defendants one of whom was his tenant and the other of whom is now described as a trespasser but who is said to have derived any title he possessed from the original tenant. The suit was filed in the Munsiff's Court being valued as an ordinary suit in eviction, the second defendant raised objections to the valuation but these were apparently overruled and the suit was decreed. An appeal was presented but was dismissed as barred by limitation. The original defendant then filed the present suit in the Court of the Sub-Judge to have the decree of the Munsiff set aside on the ground that it was passed without jurisdicton and was therefore a nullity. The learned Sub-Judge decreed this suit but the decree was set aside by the Additional District Judge in first appeal and plaintiff has now appealed to this Court.

On behalf of the appellant reliance is placed upon the decision of their Lordships of the Privy Council in Ram Hargopal Vs Kishen Chand (51 Calcutta 361) wherein it was held that a decree of a District Judge purporting to embody an award relating to property admittedly entirely beyond the territorial jurisdiction of that Court was a nullity. I have also been referred to the case of Ragubir Saran VS Hari lal (A. I. R. 1931 Allahabad 454) wherein it was held that a suit to set aside a decree alleged to have been passed by a Court without territorial jurisdiction was competent. In that judgment the bearing of Section 21 Civil Procedure Code has been discussed and it was held that the fact that in certain circumstances the question of the proper forum could not be raised in appeal would not operate as a bar to a separate suit. Both these cases however related to the question of territorial jurisdiction, the property in suit being admittedly outside the territorial jurisdiction of the Court which had passed the original decree. The present case relates to pecuniary jurisdiction which turns upon the question of the correct valuation or method of valuation of the suit; that is a question which was raised and apparently settled in the Munsiff's Court and so far as that decision is concerned the matter is governed by the provisions of Section 11 of the suits Valuation Act, which provide that objection to the valuation in the Court of first instance involving a question of jurisdiction shall not be entertained in appeal unless the objection was taken at an early stage in the Court of first instance, or unless the appellate Court is satisfied not only that the suit was undervalued but that such under valuation has in fact prejudicially affected the disposal of the suit. Further even if the objection was taken at an early stage in the Court of first instance and the appellate Court is satisfied that the suit was undervalued the latter Court will not on that ground set aside the decree unless it is satisfied that the undervaluation has prejudicially affected the disposal of the case. It will thus be clear that an error in valuation affecting the pecuniary jurisdiction of the Court of first instance will

not necessarily result in the decree of that Court being set aside as a nullity. Let us consider first a case in which the objection is taken for the first time in appeal, then as provided by Section 11 the appellate Court will refuse to entertain the objection and if that is the only objection raised the appeal will be dismissed and the decree confirmed. Will it then be open to the judgment-debtor to file another suit to have the decree set aside on grounds which he was specifically precluded from agitating in appeal, and will another Court be bound to pronounce the decree a nullity on grounds which the appellate Court was required by law not to recognise as invalidating the decree? Again suppose that the objection on the ground of undervaluation had been taken and overruled in the Court of first instance and had been raised again in appeal and the appellate Court had come to the conclusion that although the suit had been undervalued with the result that the Court of first instance had exercised jurisdiction which it would not have possessed if the suit had been correctly valued yet such undervaluation had not prejudicially affected the disposal of the suit; in that case the appellate Court would, in the absence of other objections, be bound to confirm the decree. Can it then be supposed that the Legislature contemplated that the decree should be set aside as a nullity by another Court on precisely those same grounds which the Legislature had specifically declared inadequate for that purpose in the case of the appellate Court. The distinction between the cases of territorial and pecuniary jurisdiction arises I think from the fact that in the case of defect of territorial jurisdiction the Court has a complete lack of jurisdiction ab initio, whereas if in the plaint the suit is valued at an amount within the pecuniary jurisdiction of the Court the Court has jurisdiction until it is shown that that valuation is incorrect and the correctness or otherwise of the valuation is a question for determination by the Court; if the Court decides that question wrongly a remedy is provided by way of appeal subject to the conditions prescribed by

Section 11 of the Suits Valuation Act and if that remedy is for any reason not availed of the decision of the Court of first instance on the question would stand good. It seems to me difficult to accept the argument that the Court of first instance had not jurisdiction to decide the question of the correctness of the valuation in the first instance, for we should in that case be driven to the impossible position that the Court had jurisdiction to decide the issue of valuation if the valuation as finally determined proved to be within the pecuniary jurisdiction of the Court but that the Court had no jurisdiction to decide the question if the true valuation ultimately proved to be beyond the pecuniary jurisdiction of the Court. The position I think is as stated above that the Court has jurisdiction provided the suit is valued in the plaint at an amount within the pecuniary jurisdiction of the Court, then if on objection raised or suo moto the Court finds that the court fee has been paid on an incorrect valuation it will either direct that the deficiency in Court fee be made up, of if it finds that the correct valuation would take suit out of its jurisdiction it will return the plaint for presentation to the proper Court, if on the other hand it finds that the valuation and Court fee are correct it will proceed with the suit. The court is indeed bound to decide the question for itself in the first instance and the only question which now arises is whether the aggrieved party is entitled to a remedy by way of a separate suit to prove that the decision was wrong, in lieu of or in addition to the remedy by way of appeal. If he has such a remedy by way of suit then it would be equally open whether the remedy by way of appeal had been attempted or not for it cannot be argued that by failing to appeal a party opens up for himself a new remedy by way of suit. It follows then that even if an appeal has been unsuccessful the remedy by way of suit would still be open and the relief which was refused in the appeal Court as specifically vetoed by the provisions of Section 11 of the Suit Valuation Act would be open by way of suit in another Court not bound

by those restrictions. The provisions of Section 11 would in fact be effectively stultified for it would be open to an aggrieved party to get the decree set aside by way of suit whether or not he had raised the objection to valuation in the Court of first instance and whether or not alleged under valuation had prejudiced the disposal of the case. The bearing of the provisions of Section 11 of the Suit Valuation Act on such a suit as that now under consideration have been discussed in the case reported in 22 A. L. J. 120 which has been quoted by the lower appellate court, and for the reasons given above I agree with the learned Additional District Judge that the suit is not maintainable. The appeal is accordingly dismissed with costs.

Appeal Dismissed.

Civil Second appeal No. 20 of 1931.

BEFORE MR. E. H. P. JOLLY, I. C. S.

Nathu of Pisangan

Versus.

Raja Ranchodsen Istimrardar of Pisangan.

(a) Recovery of cesses by Istimrardars and Colonel Dixon's Robkar, of 1854.

The levy of cesses e.g. Kholri, Jhumpi, Andhli and Neota by Istimrardars has never been prohibited by Government and is therefore not illegal. Colonel Dixon's Robkar of 1854 refers only to Patels and Bhumias and not to Istimrardars.

(b) Custom. Essentials of :—A custom to obtain legal recognition must be shewn to be of immemorial existence certain and invariable.

(c) Judgment or decision of an issue against a person when resjudicata against the successor Section 11 Civil Procedure Code.

In order that a judgment or decision of an issue against one person may operate as resjudicata as against that person's alleged successor, it must be shown that the successor is infact the legal representative of the former

party in respect of the issue in question. In short unless the capacity in which the legal representative is sought to be made liable is a capacity which has been derived by him from his predecessor-in-title the previous judgment cannot be a bar under section 11 Civil Procedure Code.

Counsel for the parties :—Messrs. C. F. Ball Advocate
and K. D. Deedwana for the *Appellant.*
R. S. Mithan Lal Advocate for the *Respondent.*

Subject matter of the case.

Memo. of appeal under Section 100 Civil Procedure Code against the Judgment and decree dated the 6th March 1931, passed by the District Judge, Ajmer-Merwara in Civil Appeal No. 9 of 1930.

Order.—Plaintiff sued as Istimrardar of Pisangan to recover from defendant as non-agricultural tenant-at-will certain cesses known as Kholri, Jhumpi, Andhli and Neota; the suit was dismissed in the Court of the Sub-Judge on the ground that the levy of the cesses was illegal as having been prohibited by the Government in 1854 but in appeal this decree was reversed by the learned District Judge and plaintiff was granted a decree for the sum held due from defendant on account of these cesses. Against this decree defendant has preferred the present second appeal.

The cesses have been described in the judgment of the learned District Judge; they are alleged to be obligations or liabilities attached to the tenure of non-agricultural holdings and resemble in some respects the feudal incidents associated with the feudal tenures of mediaeval times.

The first point raised is whether the learned District Judge was correct in holding that the levy of these cesses was not prohibited by the Robkar issued by Colonel Dixon in 1854 and reproduced at page 780 of the Ajmer Regulations vol: M-P. A careful examination of the preamble to this Robkar shows that the actual orders contained in the final portion thereof

by those restrictions. The provisions of Section 11 would in fact be effectively stultified for it would be open to an aggrieved party to get the decree set aside by way of suit whether or not he had raised the objection to valuation in the Court of first instance and whether or not alleged under valuation had prejudiced the disposal of the case. The bearing of the provisions of Section 11 of the Suit Valuation Act on such a suit as that now under consideration have been discussed in the case reported in 22 A. L. J. 120 which has been quoted by the lower appellate court, and for the reasons given above I agree with the learned Additional District Judge that the suit is not maintainable. The appeal is accordingly dismissed with costs.

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relate to the prohibition of recovery of cesses on the part of Patels and Bhumias and not on the part of Istimrardars. This was made clear by Colonel Dixon himself in his explanatory orders issued in 1855 of which Ex, P/1 is a certified copy from Government records. These explanatory orders of 1855 have been referred to in various judgments of 1885-1894, e. g. Ex. P/3, P/7, and P/12, and there is no reason whatever to doubt their genuineness; there is indeed evidence that as far back as 1830 Government was unwilling to interfere with the arrangements existing between Istimrardars and their tenants or to force upon Istimrardars concessions which Government was prepared to allow to its own tenants of Khalsa lands; this appears from a judgment of the District Judge Mr. Thoronton, dated 20 September '95 (Ex. D/8) wherein it is mentioned that in replying in 1830 to certain proposals put forward by Mr. Cavendish in 1829 for regulating the levy of Kholri by Istimrardars, Government stated that they were not prepared to prescribe any absolute rules but expressed the opinion that it would be very satisfactory if Mr. Cavendish could carry his proposals into effect with the consent of the Taluqdars. This I think clearly indicates the attitude of Government and that attitude is consistent with the explanatory orders issued by Colonel Dixon in 1855. I find no reason therefore to disagree with the conclusion of the learned District Judge that the levy of these cesses by Istimrardars has never been prohibited by Government and is not therefore illegal.

The most important of the cesses in question is that known as "*Kholri*" which is said to be leviable from non-agricultural tenants at the rate of 1% of their estimated annual income. This liability is alleged to be one attaching by custom to the tenure or occupancy of a non-agricultural holding; the particular tenancy in respect of which defendant is alleged to be liable has not been specified in the plaint but defendant has not denied that he is in fact a non-agricultural tenant-at-will of the plaintiff. There rests upon plaintiff therefore the burden of

proof that by custom the above mentioned liability attaches to such tenancies. Now in order that it may obtain legal recognition a custom must be shown to be of immemorial existence, certain and invariable. From the copies of judgments produced by plaintiff himself it appears that for a period of 50 years, between 1841 and 1891, the levy of Kholri by the Istimrardars of Pisangan remained in abeyance. In the years 1892 to 1894 the Istimrardar reasserted his alleged right to levy the cess and this claim being resisted a number of suits were filed against various tenants. It seems from the judgment of Mr. Martindale (Ex. P/11) that one of these suits (Istimrardar VS Kastur Chand) was tried as a test case and that the decision in that case in favour of the Istimrardar was then followed in deciding the other suits. Exs. P/7 and P/8 are copies of the judgment of Mr. Melville, Assistant Commissioner in two such suits of 1892 against Baldeo and Sheo Bux respectively. These suits were decided in favour of the Istimrardar as was also a similar suit against Suraj Karan; Suraj Karan however appealed to the District Court and Ex. D/8 is copy of the judgment of the District Judge Mr. Thoronton, who held that the lower court had wrongly decreed the suit on the strength of the decision in another suit which had been treated as a "Test case" since the decision in the other suit could not be binding upon Suraj Karan who was not a party to it; the District Judge further held that the levy of the cess was not authorized by Government and he therefore set aside the decree of the Assistant Commissioner and dismissed the suit. Against this decision it appears that a further appeal was preferred to the Chief Commissioner who being apparently unable to accept Mr Thoronton's view that the levy of the cess was illegal remanded the case to the District Court for trial of certain issues. These facts are set forth in Ex. P/11 a copy of the judgment or report of Mr Martindale who as District Judge tried these issues. The report was on the whole in favour of the Istimrardar but the Chief Commissioner in his final judgment Ex. D/9 rejected the Istimrardar's claim and

relate to the prohibition of recovery of cesses on the part of Patels and Bhumias and not on the part of Istimrardars. This was made clear by Colonel Dixon himself in his explanatory orders issued in 1855 of which Ex, P/1 is a certified copy from Government records. These explanatory orders of 1855 have been referred to in various judgments of 1885-1894, e. g. Ex. P/3, P/7, and P/12, and there is no reason whatever to doubt their genuineness; there is indeed evidence that as far back as 1830 Government was unwilling to interfere with the arrangements existing between Istimrardars and their tenants or to force upon Istimrardars concessions which Government was prepared to allow to its own tenants of Khalsa lands; this appears from a judgment of the District Judge Mr. Thoronton, dated 20 September '95 (Ex. D/8) wherein it is mentioned that in replying in 1830 to certain proposals put forward by Mr. Cavendish in 1829 for regulating the levy of Kholri by Istimrardars, Government stated that they were not prepared to prescribe any absolute rules but expressed the opinion that it would be very satisfactory if Mr. Cavendish could carry his proposals into effect with the consent of the Taluqdars. This I think clearly indicates the attitude of Government and that attitude is consistent with the explanatory orders issued by Colonel Dixon in 1855. I find no reason therefore to disagree with the conclusion of the learned District Judge that the levy of these cesses by Istimrardars has never been prohibited by Government and is not therefore illegal.

The most important of the cesses in question is that known as "*Kholri*" which is said to be leviable from non-agricultural tenants at the rate of 1% of their estimated annual income. This liability is alleged to be one attaching by custom to the tenure or occupancy of a non-agricultural holding; the particular tenancy in respect of which defendant is alleged to be liable has not been specified in the plaint but defendant has not denied that he is in fact a non-agricultural tenant-at-will of the plaintiff. There rests upon plaintiff therefore the burden of

during the 50 years 1841-1891 and that when the claim was again advanced in 1892 it was disallowed by the Court of the Chief Commissioner. In the light of these facts it is impossible to hold that the alleged custom has been invariable and continuous. The judgments of the Sub-Judges of 1901, Exs. P/9, P/10. P/13 do not carry the case for the Istimrardar any further for they purport to be based on the principle of res-judicata, the suits to which they relate having been against the sons of certain defendants in the previous suits of 1892-1894. The same applies to Ex. P/14 a copy of a judgment of the Sub-Judge of 1918. *Indeed in Ex.* P/13 *the learned Judge* admitted that he would have *felt considerable hesitation in* holding the alleged custom proved but he considered himself precluded from reopening the question. These later instances can therefore be regarded as nothing more than reiteration of the instances evidenced by Exs. P/7 P/8, and P/12 the effect of which has been entirely negatived by the Chief Commissioner's judgment Ex. D/9.

I must now notice another argument that has been put forward on behalf of the Istimrardar to the effect that as against the defendant in the present case the issue with regard to the custom of levy of Kholri is res-judicata by reason of the judgment Ex. P/7 in the suit brought by the Istimrardar against defendant's father Baldeo in 1892. Now in order that a judgment or decision of an issue against one person may operate as resjudicata as against that person's alleged successor it must be shown that the successor is in fact the legal representative of the former party in respect of the issue in question The mere fact that the present defendant is the son of Baldeo, the defendant in the suit of 1892, will not render the decision in that suit binding upon the present defendant unless it be shown that the capacity in which he is now sought to be made liable is a capacity which has been derived from his father Baldeo. In the suit of 1892 against Baldeo the issue raised was " Is the plaintiff entitled to recover Kholri cess

from the non-cultivators residing in Pisangan, including the defendant". It will be seen that the claim apparently purported to be against Baldeo in his capacity as " non-agricultural resident", and not in his capacity as tenant of a particular occupancy or non-agricultural holding. The position of non agricultural resident is not one which would devolve upon the son by inheritance; it is a purely personal capacity. In the present suit it is alleged that the liability to pay kholri is a liability attaching to the tenure of a non-agricultural holding, although even in the present suit this is somewhat vaguely expressed and the particular holding in respect of which the liability is alleged to have been incurred is not specified. In order therefore that a previous decision as to liability to pay the cess should operate as res-judicata it would be necessary to show that the liability so decided was in respect of the tenancy now in suit. This connection of the alleged liability with a particular tenancy or holding is clearly brought out in the judgment of the Chief Commissioner Ex. D/9 wherein it was held that the plaintiff had failed to prove his claim because he had failed to show that the obligation to pay the cess had ever attached to the particular tenancy in question either by express contract or by custom amounting to an implied agreement or contract. Now neither in Baldeo's case nor in the present case is there anything to show in respect of what particular occupancy or holding the case is claimed, or that the claim relates to the same occupancy in both suits; indeed as stated above the issue in the previous suit does not indicate that the claim was based upon occupancy at all put rather upon residence. It has thus never been decided in any previous suit that the occupancy which defendant now holds in Pisangan is held subject to payment of Kholri and in as much as the judgment Ex. P/7 in Baldeo's case does not purport so to decide it cannot operate as res-judicata in respect of the present issue.

Since therefore plaintiff has failed to prove the existence of an immemorial and invariable custom whereby all non-agricultural tenants are liable to pay Kholri, Jhumpi and since further he has failed to prove that such liability attaches *either* by custom or by operation of legal decision to the occupancy held by defendant, I must hold that his claim against defendant for Kholri and Jhumpi must fail.

With regard to the claim for Neota and Andhli which are cesses payable on the occasion of a death or marriage in the Istimrardar's family there is evidence that such cesses have from time immemorial been paid as suggested by the Judgments Ex. P/3, P/4, P/5, P/6. These cesses were leviable only periodically and there is nothing to suggest that the levy ever fell into disuetude as did the levy of Kholri in the year 1841 to 1891; on the contrary Ex. P/3 is a judgment of 1885 enforcing payment of Neota claimed in respect of the death of the Istimrardar in 1869. The only instance put forward of alleged successful resistence to the levy of Neota is that afforded by Ex. D/10 a judgment of the District Judge dated 2 October '95; but the decree of the District Judge was set aside by the Chief Commissioner by his judgment Ex. D/11 dated 30 June '96, and the claim for Neota was decreed. I find no reason therefore to disagree with the finding of the learned District Judge that the custom in respect of levy of Neota and Andhli has been proved.

For the reasons given above I modify the decree of the first appeal court to the extent that while the decree for Rs. 30 on account of Neota and Andhli is maintained the remainder of plaintiff's claim on account of Kholri and Jhumpi is dismissed, parties to bear their own costs throughout.

Appeal partly accepted.

Errata to Volume IV.

(Please correct wherever necessary.)

At	Page	4	Line	30	*For*	Over side	*Read*	Over ride
,,	,,	8	,,	17	,,	Judgement	,,	Judgment.
,,	,,	11	Lines	18-19	,,	Procedureal	,,	Procedural.
,,	,,	12	,,	30	,,	Statue	,,	Statute
,,	,,	14	,,	6	,,	Statue	,,	Statute.
,,	,,	14	,,	19	,,	Explaning	,,	Explaining.
,,	,,	16	,,	4	,,	Judgement	,,	Judgment.
,,	,,	17	,,	12	,,	Madulal's	,,	Modulal's
,,	,,	17	,,	12	,,	When	,,	Where
,,	,,	18	,,	29	,,	Reasonable	,,	Reasonably.
,,	,,	19	,,	13	,,	My	,,	Any.
,,	,,	19	,,	20	,,	Defendent	,,	Defendant.
,,	,,	19	,,	22	,,	Defendent	,,	Defendant.
,,	,,	19	,,	28	,,	Beceased	,,	Deceased.
,,	,,	20	,,	16	,,	a side	,,	aside
,,	,,	20	,,	23	,,	Judgement	,,	Judgment.
,,	,,	21	,,	7	,,	Brrught	,,	Brought
,,	,,	21	,,	13-14	,,	Defendent	,,	Defendant
,,	,,	21	,,	22	,,	,,	,,	,,
,,	,,	21	,,	26	insert "it" between "Case" and "may"			
,,	,,	23	,,	7	*For*	Judgement	*Read*	Judgment
,,	,,	23	,,	23	,,	Abopted	,,	Adopted
,,	,,	23	,,	27	,,	Declartion	,,	Declaration
,,	,,	24	,,	3	,,	Judgement	,,	Judgment
,,	,,	24	,,	8	,,	Defendent	,,	Defendant
,,	,,	24	,,	25	,,	entertaiment	,,	entertainment
,,	,,	26	,,	18	,,	Mortgage	,,	Mortgagee
,,	,,	26	,,	19	delete the word 'the' after 'before'			
,,	,,	28	,,	2	Insert 'and' between "12 (c)" and '14' and 'of' between '14' and 'Regulation'			
,,	,,	30	,,	27	*For*	Made	*Read*	Make
,,	,,	30	,,	28	,,	my	,,	Any

Errata to Volume IV.

(Please correct wherever necessary.)

At	Page	4	Line	30	*For*	Over side	*Read*	Over ride
,,	,,	8	,,	17	,,	Judgement	,,	Judgment.
,,	,,	11	Lines	18-19	,,	Procedureal	,,	Procedural.
,,	,,	12	,,	30	,,	Statue	,,	Statute
,,	,,	14	,,	6	,,	Statue	,,	Statute.
,,	,,	14	,,	19	,,	Explaning	,,	Explaining.
,,	,,	16	,,	4	,,	Judgement	,,	Judgment.
,,	,,	17	,,	12	,,	Madulal's	,,	Modulal's
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,,	,,	18	,,	29	,,	Reasonable	,,	Reasonably.
,,	,,	19	,,	13	,,	My	,,	Any.
,,	,,	19	,,	20	,,	Defendent	,,	Defendant.
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,,	,,	20	,,	23	,,	Judgement	,,	Judgment.
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[illegible]								

„	„	33	„	8	„	plaintiff	„	plaintiff's
„	„	35	„	7		Delete 's' after the word 'District'		
„	„	36	„	31	*For*	Consider	*Read*	considered
„	„	38	„	3	„	Judgement-Debtor	„	Judgment-Debtor
„	„	38	„	5	„	„	„	„
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,,	,,	83	,,	24	,,	pre-emption	.,	presumption
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,,	,,	107	,,	19	,,	Of	,,	Or
,,	,,	112	,,	9	,,	Insert the word 'that' between 'that' and 'document'		

Short Notes of Important Judgments.

1 Limitation Act: sections 20-21 (2). Payment by one co-debtor. Whether extends period against the other. A payment by one co-debtor cannot operate to extend the period of limitation under section 20 Limitation Act as against a joint co-debtor unless the payment be shown to have been made on behalf of the latter.

The provisions of section 20 Limitation Act must be read subject to the provision of secton 21 (2) Limitation Act.

Civil Revision No. 182 of 1931,

44 Cal 978 followed.

Date of judgment 8th January 1931.

Parties.—Tota Ram son of Bijey Ram Brahmin employed in Loco Shop, Department No. 10. Versus Ram swarup son of S. Hazari Mal of Ajmer.

2. Civil Procedure Code: Order 3 rule 4 (2).

Pleader, appointment by a guardian ad litem of a minor, whether appointment ceases on minor's attaining majority. There is no authority for the proposition that a pleader duly appointed on behalf of a minor becomes functus officio on the minor's attaining majority. Under Order 3 rule 4 (2) C. P. C. an appointment once duly made continues in force until determined with the leave of the court by a writing signed by the client or until the client or pleader dies or until the proceedings in the suit are ended as regards the client.

Civil Second Appeal No. 1 of 1932.

Date of judgment 18th January 1932.

Parties:—Babu lal son of Johrilal Mahajan of Ajmer. Versus 1. G. Atkins Srinagar Road, 2. Hira lal son of

Civil Revision Application No. 154 of 1930.

9 All. 398 Foll.

Date of judgment 24th September 1931

Parties:—Mangilal Versus Gopalji.

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6. Pro-Note. Consideration. Burden of proof. Though under section 118 of the Negotiable instruments, Act there is a presumption that a pro-note is for consideration and the burden of proof lies on the defendant to prove the lack of it, yet when the plaintiff himself has admitted that the consideration was not as recited in the pro-note the burden is shifted to the plaintiff to prove his allegations.

Civil Revision Application No. 171 of 1931.

4 Allahabad 458 Foll.

Date of judgment 14th January 1931.

Parties.—S. Scott Versus Sheo Narain Khatri.

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7. Dewan's right to offerings-Nature of-$\frac{3}{4}$ Lease thereof beyond life time invalid. (*a*) The Dewan's right to receive a share in the offerings at the Durgah is a right attached to his office and is not heritable property inspite of the fact that the right to the office of the Dewan ordinarily goes by inheritance

(*b*) As such the right to receive a share in the offerings is inseparable from the office of the Dewan and inalienable beyond the life time of the office-holder for the time being on grounds of public policy 'Extra commercium under section 6 (d) of the Transfer of Property Act.'

50 Allahabad 394 and 43 Cal 28 discussed.

(c) In accordance with general usage and practice the Dewan is entitled to the disposal of the whole of the surpals income after due provision had been made for the maintenance of the shrine and the performance of the necessary ceremonies etc. But this general right can only hold good in the absence of any evidence of usage to the contrary in respect of the particular shrine in question.

19 Cal. 203 and 44 Mad. 131 P. C.

Discussed.

Appeal accepted. Lower Court's decree modified.

Civil First appeal No. 9 of 1931.

Date of judgment 4th January 1932.

Parties:—Dewan Sayed Aley Rasul Ali Khan Sajjada Nashin Khwaja Moinuddin Chisti Sahib Ajmer. Versus Altaf Hussain and 19 others Khadims of Ajmer and the Durgah Committee of Ajmer.

8. Jagirdar—Right to enhance rent or hansil on transfer of the occupancy. (a) Occupancy rights are transferrable, and the obligation to pay hansil is an obligation which goes with the occupancy.

(b) A Jagirdar is not ordinarily entitled to enhance the hansil on any occupancy tenure so long as land Revenue settlement lasts except as permitted by sections 42-47 of the Land Revenue Regulation.

Civil second Appeal No. 49 of 1931.

Date of judgment 15th January 1932.

Parties:—Bhian son of Nanda Jat of Dantra. Versus S. Nisar Ahmad Jagirdar of Dantra.

9. (a) General clauses Act-section 3 (2). Acts include omissions.

(b) Ajmer-Merwara Municipalities Regulation No. 7 of '25. By virtue of sections 3 (2) of the General Clauses Act acts include illegal omissions.

Notice under section 233 A. M. M. R. is a necessary preliminary to a suit, against the Committee for the recovery of rent. Acts or illegal omissions in this section include both cases of tort and contractual obligations.

51 Bombay 725 P. C. Foll.

Civil second appeal No. 51 of 1931.

Date of judgment 11th January 1932

Parties:—Municipal Committee Ajmer. Versus [illegible] Pershad Thekadar Shamlat Thok Telian.

10. Redemption decree. Execution for opposite party's costs. Limitation. Commencement of. (*a*) In a redemption decree where costs of the suit have been awarded to the defendant, execution can not be had by him under Order [illegible] rule 19 so long as a larger sum is payable by him under the decree to the plaintiff.

(*b*) The defendant being entitled to a set off only for [illegible] limitation for execution of his decree for costs would commence from the date of payment of the redemption money to the plaintiff.

Civil Second appeal No. 53 of 1931.

23 Mad. 121 Foll.

Date of judgment 15th January 19[illegible]

Parties:—Seth Sobhag Mal of Ajmer Versus [illegible] Ram Chander Executive Engineer.

5o Allahabad 394 and 43 Cal 28 discussed.

(c) In accordance with general usage and practice the Dewan is entitled to the disposal of the whole of the surpuls income after due provision had been made for the maintenance of the shrine and the performance of the necessary ceremonies etc. But this general right can only hold good in the absence of any evidence of usage to the contrary in respect of the particular shrine in question.

19 Cal. 2o3 and 44 Mad. 131 P. C.

Discussed.

Appeal accepted. Lower Court's decree modified.

Civil First appeal No. 9 of 1931.

Date of judgment 4th January 1932.

Parties:—Dewan Sayed Aley Rasul Ali Khan Sajjada Nashin Khwaja Moinuddin Chisti Sahib Ajmer. Versus Altaf Hussain and 19 others Khadims of Ajmer and the Durgah Committee of Ajmer.

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(b) A Jagirdar is not ordinarily entitled to enhance the hansil on any occupancy tenure so long as land Revenue settlement lasts except as permitted by sections 42-47 of the Land Revenue Regulation.

Civil second Appeal No. 49 of 1931.

Date of judgment 15th January 1932.

Parties:—Bhian son of Nanda Jat of Dantra. Versus S. Nisar Ahmad Jagirdar of Dantra.

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AND

MR. MOHAN LAL CAPOOR, B.A., LL.B.



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AJMER.

Small Cause Court Revision Application No. 83 of 1932.

BEFORE MR. A. S. R. MACKLIN I. C. S.

Man Mal son of Ghisa Lal Saraogi, owner of the shop, Kundan Mal Man Mal of Nasirabad .... *Plaintiff - Applicant.*

Versus.

Gog Raj son of Kura Mal (2) Champa Lal son of Gog Raj Mahajans of Nasirabad proprietors of the shop Kura Mal Gog Raj of Nasirabad .... *Defendants, Opposite Party.*

1. **Small Cause Interlocutory orders - Revision of :**

The provisions of section 25 of the provincial Small Cause Courts Act are wide and even interlocutory orders are open to revision under it.

2. **Amendment of Pleadings - Rules and principles for grant of leave:**

(a) The rule is that amendments in pleadings ought ordinarily to be allowed.

(b) Leave to amend should be refused where :

(i) the application is not made in good faith, or

(ii) the amendment would introduce a totally inconsistent case, or

(iii) the effect would be to take away from the opposite party a legal right which has accrued to him by lapse of time.

(c) A change in the cause of action is not necessarily a bar to an amendment of a plaint. What is a bar is the substitution of an inconsistent cause of action; inconsistency meaning two facts or sets of facts which cannot exist together.

Date of judgment [illegible]

Counsels :—Mr. Hem Chander Sogani Advocate for the [illegible]

Mr. Ram Chander Airun Vakil for the [illegible]

Subject matter of the case.

Application for revision under Section 25 of the Provincial Small Cause Courts Act IX of 1887 against the order dated the 12th February 1932, Passed by the Judge Small Cause Court, Nasirabad in suit No. 31 of 1931.

Order.—The action which has given rise to this application in revision was brought by the plaintiff on, the basis of accounts stated between himself and the defendent. In the Course of the trial the plaintiff sought leave to amend the plaint by basing his claim upon the items comprised in the account instead of on the account itself. The reason for the proposed amendment was that the account had not been signed by the defendant, and it was feared that it would not furnish a cause of action. The lower Court refused to allow the plaintiff to amend the plaint on the ground that the amendment would introduce a new cause of action. Having refused to allow the plaintiff to amend the plaint, it proceeded to determine the case as originally presented and dismissed the claim on the ground that there was no cause of action. The plaintiff now comes in revision The application is ostensibly against the order dismissing the suit; and here the applicant has no case at all, since on the pleadings the lower Conrt could not have adopted any other course than to dismiss the suit. But the real ground of the application is the rejection of the plaintiff's interlocutory application to amend the plaint. It is suggested by the opponents to the present application that this is not a ground upon which this Court can interfere in revision. But the provisions of section 25 of the Provincial Small Cause Courts Act are wide, and I do not see how it can be argued that the revision of an interlocutory order which has the effect of making the dismisal of a suit inevitable is a matter which is not open to the Court in revision.

2. The question then for consideration is whether or no the lower Court was right in rejecting the application to amend the plaint. I hold that it was not right. The rule is that amendments in pleadings ought ordinarily to be allowed. But in certain circumstances an amendment must be refused. Apart from certain minor circumstances which have no application here, there are three main grounds for refusing leave to amend a plaint, namely (1) that the application for amend-

ment is not made in good faith, (2) that the amendment would introduce a totally inconsistent case, and (3) that the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time.

3. These three grounds have all been urged before me in support of the lower Court's order rejecting the application for leave to amend.

(1) As regards the *bona fides* of the applicant, it is alleged that the new plaint bases a claim for interest upon commercial usage, whereas in the original plaint it bases the claim for iuterest upon an agreement between the plaintiff and the defendant. But this does not seem to me a ground for thinking that the application has been made *mala fide*. The existence of commercial usage to charge interest does not prevent the parties from agreeing between themselves that a certain rate of interest shall be charged.

(*ii*) The lower Court has rejected the application for leave to amend solely on the ground that it introduces a new cause of action. It is arguable that the amendment does introduce a new cause of action. The plaint as drafted was based in effect upon an acknowledgment of liability, whereas the new plaint is based upon items making up an account. But a change in the cause of action is not necessarily a bar to an amendent of the plaint. What is a bar to an amendment of the plaint is the substitution of a cause of action which is inconsistent with the cause of action as originally stated. By "inconsistency" is meant two facts or sets of facts which cannot co-exist together. It is, for example, illegal to amend a plaint in a suit for rent so as to convert the suit into one for damages for use and occupation. In the suit for rent the defendant is being sued as a tenant having a right to be on the land; in the other suit he is being sued as a trespasser having no right to be on the land. The two sets of fact cannot exist together and the basis of the two claims is inconsi-

tent. But there is no inconsistency in the present case. In the original plaint the suit was based on an account stated between the parties. The account was made up of certain items, and the basis of the suit was that the defendant had assented to the balance struck on these items. The basis of the suit as sought to be amended is again the balance of the items, but is not the defendant's acknowledgment of the balance. In each case the balance of the items is in question. The set of facts in the original case consists of a statement of the accounts said to have been accepted by the defendant; in the second case the set of facts consists of the items of those accounts. Obviously the items of the accounts and the balance of the accounts exist together; and, if they exist together, then there can be no inconsistency. So far there is no good ground for rejecting the application for leave to amend the plaint.

(*iii*) There is however one more objection to an amendment which might well be applicable to this case. In the amended plaint it is said that the dealings between the parties began in the year 1923, some years out of the period of limitation. It follows that a suit brought on the accounts as a whole will be time barred in respect of several items. It is however stated in the amended plaint that certain specific items are of importance for the plaintiff's case, and some of these items appear to be within the period of limitation. I cannot therefore reject this claim to amend the plaint merely on the ground that in some respects the defendants would b[e] deprived of a legal right. How far the defendant has acquir[ed] a right by limitation is a question of fact which can b[e deter]mined only when the accounts are examined and ev[idence] recorded. Even if the suit is allowed to proceed on t[he basis] of the amended plaint, it will still be open to the defen[dant to] challenge the items as being barred by limitatio[n].

4. For these reasons the application must [be a]llow[ed and] the case sent back for trial on the basis of the a[men]ded

The costs of both the application for leave to amend the plaint and of the proceedings in this Court will be borne by the plaintiff, whatever be the result of the case, since it is his fault that the suit was not presented in proper form at the beginning.

Application accepted.

Criminal Application No. 18 of 1932.

BEFORE MR. E. H. P. JOLLY I.C.S.

Bhura Lal of Jalia .... *Accused*
Charge:— Section 3 of Ordinance III of 1932.

Versus

Crown .... *Opposite Party.*

Ordinance III of 1932. Powers of High Court to grant bail.

Provisions of section 4 of Ordinance III of 1932 do not operate to override the provisions of sections 497 and 498 of the Criminal Procedure Code; they merely attract the provisions of section 497 rather than those of section 496. The High Court has consequently authority to grant bail.

Date of Judgment:—18/4/32.

Counsels.—Mirza Abdul Qader Beg Vakil for the ... *Applicant.*
The Prosecuting Inspector for the ... ... *Crown.*

Subject matter of the case.

Application for bail under Section 498 Code of the Criminal Procedure.

Order.—Applicant has been arrested for an alleged offence under Section 3 of Ordinance No. III of 1932, and has applied to this Court for bail. On behalf of the Crown it has been contended that in view of the provisions of section 4 of the

tent. But there is no inconsistency in the present case. In the original plaint the suit was based on an account stated between the parties. The account was made up of certain items, and the basis of the suit was that the defendant had assented to the balance struck on these items. The basis of the suit as sought to be amended is again the balance of the items, but is not the defendant's acknowledgment of the balance. In each case the balance of the items is in question. The set of facts in the original case consists of a statement of the accounts said to have been accepted by the defendant; in the second case the set of facts consists of the items of those accounts. Obviously the items of the accounts and the balance of the accounts exist together; and, if they exist together, then there can be no inconsistency. So far there is no good ground for rejecting the application for leave to amend the plaint.

(*iii*) There is however one more objection to an amendment which might well be applicable to this case. In the amended plaint it is said that the dealings between the parties began in the year 1923, some years out of the period of limitation. It follows that a suit brought on the accounts as a whole will be time barred in respect of several items. It is however stated in the amended plaint that certain specific items are of importance for the plaintiff's case, and some of these items appear to be within the period of limitation. I cannot therefore reject this claim to amend the plaint merely on the ground that in some respects the defendants would be deprived of a legal right. How far the defendant has acquired a right by limitation is a question of fact which can be determined only when the accounts are examined and evidence is recorded. Even if the suit is allowed to proceed on the basis of the amended plaint, it will still be open to the defendant to challenge the items as being barred by limitation.

4. For these reasons the application must be allowed and the case sent back for trial on the basis of the amended plaint.

Civil Revision Application No. 193 of 1931.

BEFORE MR. E. H. P. JOLLY I. C. S.

Firm Nemi Chand Gulab Chand at Togi (Todgarh) through its proprietor Nemi Chand son of Choga Lal

Applicant.

Versus

Natha deceased represented by Khuma and Tila sons of Natha by caste Rawats residents of Togi Baria Natha Tehsil Todgarh .... *Opposite Party*

(a) **Dismissal of suit. Reasons for:—**

In a case where there is nothing to excite suspicion and where the plaintiff has given such proof of his claim as the law requries the plaintiff is entitled to have some indication from the Judge of the point on which he dismisses the suit.

23 Bombay 334 Foll.

(b) **Suit against legal representatives. Standard of proof.**

A Court should proceed with care in examining the plaintiff's claim against legal representatives who have no personal knowledge of the alleged transaction.

Date of Judgment:—5th April 1932.

Counsels —Mr. Mukat Behari Lal Vakil for the ... *Applicant.*

Mr. Jasodha Nandan Advocate for the ... *Opposite Party.*

Subject matter of the case.

Application for revision under section 25 of the Provincial Small Cause Courts Act IX of 1887 read with section 115 Civil Procedure Code against the Judgment and Decree dated the 22nd October 1931, passed by the Judge small Cause Court, Beawar, in suit No. 252 of 1931.

Order.—This is an application for revision of a decree of the Judge Small Cause Court Beawar dismissing plain-

applicant's suit. Plaintiff sued the sons of the deceased Natha on a khata for Rs. 300 alleged to have been executed by Natha. Defendants stated that they did not know if their father had borrowed the money and executed the khata. Execution of the khata and payment of consideration was proved by plaintiff and Sehs Mal the writer of the khata. Plaintiff further produced a post card from defendants wherein they admitted that money was due to plaintiff and promised to pay; it is however an admitted fact that plaintiff had other dealing with Natha and there is nothing to shew that the postcard related to the khata now in suit.

The learned Judge has not given any reason for rejecting the evidence of plaintiff and Sehs Mal beyond suggesting that it is improbable that Sehs Mal should have remembered the transaction; he has added that the khata should have been proved in some other way; in what other way it was open to plaintiff to prove the khata is not very clear. As stated in Bai Jasoda Versus Bamansingh (23 Bombay 334) "in a case where there is nothing to excite suspicion and where the *plaintiff has given such proof of his claim as the law requires* plaintiff is entitled to have some indication from the Judge of the point on which he dismisses the suit". I have examined the khata in plaintiff's book of account in the present case and find nothing there to excite suspicion. No doubt a Court should proceed with care in examining the plaintiff's claim against legal representatives who have no personal knowledge of the alleged transaction; but in the present case no adequate reason has been given for rejecting the evidence, which prima facie afforded the necessary degree of proof of plaintiff's claim, and in absence of any evidence in rebuttal I think that plaintiff was entitled to a decree.

I accordingly set aside the decree of lower Court and decree plaintiffs claim with costs throughout.

Application accepted

Civil Revision application No. 1 of 1932.

BEFORE MR. E. H. P. JOLLY I. C. S.

Chitar Mal and Sens Mal sons of Birdhi Chand Mahajans Oswals of Beawar ... *Plaintiffs-Applicants.*

Versus

Sujana deceased represented by Bhagirath and Jawahara sons of Sujana Gujars of Beawar *Defendants-Opposite Party.*

(*a*) **Stamp Act. Sections 14 and 15. Applicability of.**

The provisions of section 15 of the Stamp Act will apply if a second instrument is written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written. It is immaterial whether the second instrument in fact bears a stamp or not.

Section 14 of the Stamp Act prohibits not merely the attempt to use the original stamp for a double purpose but also the actual writing of a second instrument on the same piece of paper.

(*b*) **Acknowledgment of a debt - On the back of the bond-Admissibility of:—**

An acknowledgment of a debt even though stamped with an anna stamp, if written on the back of the original bond, is to be deemed unstamped within the meaning of section 15 of the Stamp Act and is inadmissible in evidence and cannot form the basis of the suit.

(*c*) **Unstamped documents - Admissibility of, on payment of penalty under section 35 of the Stamp Act.**

It is ordinarily open to tender such unstamped documents on payment of stamp duty with penalty, but an acknowledgment which is chargeable with a duty of one anna is excluded from this category by section 35 of the Stamp Act and cannot be so tendered.

11 Madras 40 Distinguished.

Date of Judgment —13/4/1932.

Counsels:—Mr. Kaushal Kishore Advocate for the applicant.

Subject matter of the case.

Application for revision against the order of the Judge Small Causes, Beawar passed in suit No. 299 of 1931 on the 30th September 1931.

Order.—Plaintiff sued on an acknowledgment of balance due written on the back of the original bond. The acknowledgment was stamped with a one anna stamp but the learned Judge of the Small Cause Court Beawar held that the acknowledgment was in contravention of the provisions of Section 14 of the Stamp Act and should therefore, in accordance with the provisions of Section 15 of the same act, be deemed to be unstamped; it followed that the acknowledgment was inadmissible in evidence under Section 35 of the Stamp Act, and since the instrument of acknowledgment was chargeable only with a one anna stamp the defect could not be remedied by payment of stamp and penalty under the proviso to Section 35; the suit was accordingly dismissed. Plaintiff *has applied to this Court in revision.*

On behalf of applicant it has been urged that the provisions of Sections 14 and 15 of the Stamp Act apply only to cases in which the second instrument is in fact unstamped *i. e.* to cases in which an attempt is made to utilise the stamp of the original instrument to cover both instruments. Such an interpretation is contrary to the clear provisions of Sections 14 and 15; section 14 provides that, with certain exceptions, no second instrument chargeable with duty shall be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written, while section 15 provides that if a second instrument is so written it shall be deemed to be unstamped. It is clear therefore that the provisions of section 15 will apply whether the second instrument in fact bears a stamp or not, otherwise it would be open to a party to disregard the provisions of section 14 entirely provided he affixed the necessary stamps to second instrument. If the intention of the legislature had been merely that the stamp of the first instrument should not be used to cover a second instrument on the same piece of paper section 14 would presumably have been worded to that effect, but what the section prohibits is not merely the attempt to use the

original stamp for a double purpose but the actual writing of second instrument on the same piece of paper, and if a second instrument is written on the same piece of stamped paper the provisions of section 15 will apply whether the second instrument bears a stamp or not.

It is clear that the second instrument in the present case does not fall within the scope of any of the exceptions in the proviso to section 14. The instrument is an acknowledgment by the debtor, it does not transfer any right created by the original instrument nor is it an acknowledgment of receipt of money secured by the original instrument. It follows that the acknowledgment in the present case must under Section 15 be deemed to be unstamped. No doubt it would ordinarily have been open to plaintiff to tender the instrument admissible by payment of the stamp duty with penalty as was held in the case reported in 11 Madras 40, but in the present case the instrument was chargeable with a duty of one anna and the proviso to section 35 of the Stamp Act precludes this remedy in such cases. It follows that the instrument upon which plaintiff based his suit was inadmissible in evidence and the suit was therefore rightly dismissed.

The application is accordingly dismissed with costs.

Application dismissed.

Miscellaneous Civil Application No. 53 of 1932.

BEFORE MR. E. H. P. JOLLY I. C. S.

Manmohan Mal Lodha minor under the guardianship of Bhanwar Mal Lodha and Bhanwar Mal son of Seth Ghasi Mal Lodha of Nagore .... *Applicants*

Versus

Rai Bahadur Seth Biradh Mal Lodha son of Seth Samir Mal (2) Seth Gadh Mal Lodha, (3) Seth Kan Mal Lodha, (4) Seth Sobhag Mal Lodha minor son of Seth Abhey Mal Lodha through his guardian and mother Sethani Daulat Kanwar, (5) Sethani Manohar Kanwar widow of Seth Guman Mal Lodha and (6) Sethani Parbhavati Kanwar widow of Seth Jeet Mal Lodha, All of Ajmer *Opposite Party.*

Order 45 rule 7 Civil Procedure Code. Leave to appeal to the Privy Council. Deposit of security. Power of extension of time. Cancellation of leave-Grounds for.

Order 45 rule 7 of the Civil Procedure Code is governed by Rule 9 of the Privy Council Rules. Under that Rule on failure of the appellant to furnish security the Court has discretion either to cancel the leave or to make such further or other order as the justice of the case requires.

Where the appellant is misled by a clerical mistake in the order of the Court and files security after the time allowed by order 45 rule 7 the justice of the case does not require that the leave should be revoked.

44 Allahabad 216 and 26 A. L. J. 433 dissented from

51 Bombay 430 F. B. Foll.

Date of Judgment:—16th April 1932.

Counsels:—Mr. Mohan Lal Capoor Advocate for the ... *Applicants.*

Rai Sahib Mithan Lal Advocate for the ...*Opposite Party.*

Subject matter of the case.

Application for revocation and cancellation of the leave granted to appeal to His Majesty in Council under Order in Civil Appeals Nos. 50 and 68 of 1930 on 4th May 1931.

Order.—This is an application for revocation of the leave granted to the opponents to appeal to His Majesty in Council on the ground that opponents failed to deposit security within the period prescribed by O. 45 r. 7 Civil Procedure Code. The order granting the certificate was passed on 3-10-31 and the decree under appeal was passed on 4-5-31; the period of ninety days from the date of the decree contemplated by

O. 45 r. 7, (1) had therefore already expired when the order granting the certificate was passed on 3-10-31 and security should therefore have been deposited within six weeks of the order granting the certificate. In the order however appellants were *by an unfortunate slip of the pen* directed to deposit the security within ninety days instead of within six weeks and this slip has only now been brought to my notice. Appellants did make the deposit within ninety days as directed in the order but not within six weeks as required by the provisions of O. 45 r. 7. and the question now before me is whether the grant of the certificate should be revoked.

On behalf of the present applicant reliance is placed on the ruling in Ram Dhan Versus Prag Narain (44 Allahabad 216) to the effect that the Court has no power to extend the period prescribed by O. 45. r. 7. for deposit of security; this ruling was followed in Joti Prasad Versus Hamesh Singh (26 A. L. J. 433). But a contrary view was expressed by a full Bench of the Bombay High Court in Nil Kanth Balwant Versus Vidya Narsinh Bharti (51 Bombay 430), where in it was pointed out by the learned Chief Justice that no penalty is provided by O. 45. r. 7. for failure to furnish security and that the procedure and powers of the Court in that respect are therefore governed by rule 9 of the Privy Council Rules. Under that rule the Court may, on failure of the appellant to furnish security, cancel the certificate for admission or it may make such further or other order as in the opinion of the Court the justice of the case requires. In the present case I am not dealing with an application for extension of time but with the question whether the certificate should be cancelled. It appears to me that rule 9 of the Privy Council Rules clearly leaves a discretion in the hands of the Court, and the Court is not therfore bound to cancel a certificate already granted. In the present case in as much as the appellants may have been misled by what may be termed the clerical error in the order of this Court (for the Court certainly entertained no

intention of extending the time), I consider that the justice of the case does not require that the certificate should be revoked. The application for revocation is accordingly dismissed. No order as to costs.

Application rejected.

Criminal application No. 42 of 1928.

BEFORE MR. G. C. SHANNON I. C. S.

Sheo Datt son of Radha Ballabh Brahmin of Ajmer

Applicant.

Versus

Baboo Lal son of Govind Ram Brahmin of Ajmer.

Accused, Opposite Party.

1. Section 517 and 520 of the Criminal Procedure Code-Jurisdiction of the Sessions Judge under section 520.

Under section 520 of the Criminal Procedure Code the Sessions Judge has no jurisdiction to revise an order passed under section 517 of the same Code by a Bench of Magistrates.

42 Bombay 664 and 1924 Allahabad 675 (A.I.R.) Foll:

2. Property does not always follow possession:—

It is not an inevitable rule of law that property follows possession. The true rule is that the real owner should not be allowed to suffer.

Date of Judgment:—7/1/1929.

Counsels:—Mr. Gauri Shanker Bar-at-law for the *Applicant.*

Mr. Anandi Prasad Bhargava, Advocate for the.

Opposit Party.

Subject matter of the case.

Application under Section 439 of the Code of Criminal Procedure Act V of 1898, against the order dated the 3rd September 1928, passed by the Sessions Judge, Ajmer, in Criminal Appeal No. 81 of 1928.

Order.—This is an application under Section 439 Criminal Procedure Code to revise the order passed by the Additional Sessions Judge, Ajmer in Criminal Appeal No. 81 of 1928.

The facts pertinent to this order are as follows. The applicant Shive Datt had living with him his widowed sister-in-law Bhagwati. The respondent Babu Lal was a tenant of applicant. Shive Datt suspected Bhagwati and Babu Lal with the result that he got rid of Babu Lal and sent or drove Bhagwati away. When the latter left the applicant went through his property to find two ornaments missing. He reported the case to the police; they searched Babu Lal's house and found the two ornaments but failed to send a charge sheet, so Shive Datt made a direct complaint to a Magistrate. The case came before the "A" Bench of Honorary Magistrates. They acquitted Babu Lal of theft or dishonest retention of stolen property but held on the evidence that the complainant had proved that the ornaments were his and under Section 517 Criminal Procedure Code awarded them to him. Against that part of the order Babu Lal appealed to Additional Sessions Judge who allowed the appeal and awarded him the ornaments. From that order in appeal Shive Datt comes in revision.

In this Court the first objection taken is that the learned Additional Sessions Judge had no jurisdiction to hear the appeal. In my opinion this objection is valid. It turns on a construction of Sections 517 and 520 of the Criminal Procedure Code. The former gives the trial Court wide discretion and powers as to the disposal of property produced before it or in its custody etc., Section 520 Criminal Procedure Code reads: "Any Court of Appeal, confirmation, reference or revision may direct any order under Section 517.............. passed by a Court subordinate there—to be stayed pending consideration by the former Court, and may modify, alter or

annual such order and make any further orders that may be just". The question is, what is the Court to which an appeal lay. The matter I think is clear from the decision reported in I.L.R. 42 Bombay 664. That case is on all fours with this. The head note runs " that the Sessions Judge had no jurisdiction under Section 520 Criminal Procedure Code to make the order he had made, since he was neither a Court of Appeal or a Court of revision in the case. It is important here to bear in mind that Babu Lal was acquitted. There is a ruling of the Madras High Court to the contrary, but the Bombay ruling was approved by the Allahabad High Court (All India Reporter for 1924, Allahabad 675, Debi Ram Versus King Emperor). It is the tradition here to follow Allahabad in case of discrepant rulings. I therefore hold that the Additional Sessions Judge had no power to entertain the appeal.

It remains to consider what order this Court ought to pass. I feel that the right order in the circumstances is to set a side the order of the Additional Sessions Judge and to restore that of the Bench Magistrates. I have no appeal or revision application before me from Babu Lal. The order of the Additional Sessions Judge was passed without Jurisdiction. The Bench Magistrates had the advantage of seeing the witnesses as to possession and identification of the ornaments. They believed the goldsmith who gave evidence for the applicant. The learned Additional Sessions Judge has relied on two rulings of the Calcutta High Court. They do not lay it down as an in-evitable rule of law that property follows possession and it would be absurd to award property to a thief merely because the complainant cannot prove criminality, although he may be able to establish his ownership to the hilt. The true rule should be that the real owner should not be allowed to suffer.

For these reasons I would allow this application and set aside the order of the Additional Sessions Judge and restore that of the Bench Magistrates.

Application Allowed.

Criminal Application No. 17 of 1928.

BEFORE MR. R. S. BROOMFIELD I. C. S.

Sikander Ali alias Pappu son of Saadat Ali of Ajmer.

Applicant.

Versus

Crown through the Public Prosecutor Ajmer

Opposite Party.

1. Evidence of accomplice-Evidentiary value of.

(*a*) It is an established rule of practice that the evidence of accomplices requires corroboration in material particulars. The Lahore High Court goes to the length of calling it a rule of law.

(*b*) One accomplice cannot be said to corroborate another so as to do away with the necessity for corroboration.

8 Allahabad 306 Foll.

(*c*) In exceptional cases a court may be justified in convicting on uncorroborated accomplice evidence. But such accomplice evidence must be of a kind which a Magistrate after very careful scrutiny with the law present in his mind, can sustain in holding trustworthy inspite of the usual restrictive rule.

35 Madras 247 and 397 relied upon.

(*d*) The mere absence of a proved motive for giving false evidence cannot be regarded as a good reason for relying on the evidence of accomplices.

Date of Judgment.—18th July 1928.

Counsels —Mr Abdul Rashid, Advocate for the *Applicant.*

K B. Abdul Wahid Khan Public Prosecutar for the *crown.*

Subject matter of the case.

Application for revision against the order of the Sessions Judge, Ajmer passed on the 20th April 1928 in case No. 45 of 1928.

Order. *The facts leading to this revision application* are shortly as follows. Some ornaments were stolen from a house by Ghulam Mahomed and Kallu, and sold by them to Ahmed Bux. During the investigation of the case the thieves stated that the applicant Sikander Ali had assisted in the disposal of the stolen property. He was prosecuted for an *offence under Section 414 Indian Penal Code* in the Court of the City Magistrate, Ajmer, and convicted. The conviction was based on the evidence of the two thieves and Ahmed Bux. An appeal to the Session Judge, was summarily dismissed.

The only question of any importance which arises in this application is whether the conviction can be sustained in view of the fact that it is based on the uncorroborated testimony of accomplices. The learned Public Prosecutor who appears for the Crown was at first inclined to dispute the fact that Ahmed Bux was an accomplice, and the man was as a matter of fact acquitted on his trial for receiving. But he did not press this point and admitted that there were circumstances suggesting his complicity. Some of the stolen ornaments were found in his house hidden in a drain and partly melted down. The trial Magistrate says in his judgment that "all these witnesses" (that is Ghulam Mahomed, Kallu and Ahmed Bux) "were in one way or the other implicated in connection with the theft and the stolen property," *and there is nothing in the learned Sessions Judge's* order to show that he took a different view. For the purposes of this case we must take it that Ahmed Bux was an accomplice along with the two thieves.

Now it is an established rule of practice, that the evidence of accomplices requires corroboration in material particulars. Numerous authorities for this proposition may be found in any commentary on Sections 114 and 135 of the Evidence Act. I need only refer to 1 Bombay 475, 10 Bombay 319, 14 Bombay 115, 8 Allahabad 306 and 509, 5 W. R. Cr. 18, 38 Calcutta 559, 27 Madras 271, A. I. R. 1927 Lahore 581. In

the last case the Court went so far as to call it not merely a rule of practice but a rule of law. It is also clear (vide 5 W. R. Cr. 80, 8 Allahabad 306 etc.) that one accomplice can not be said to corroborate another so as to do away with the necessity for corroboration. On the other hand, no doubt, it has been held that there may be exceptional cases in which the court may be justified in convicting on uncorroborated accomplice evidence; see the Judgment of one of the Judges in 14 Bombay 115, 29 Allahabad 529, 35 Madras 247 and 397. If these latter cases are examined, however, they can hardly be said to support the conviction in this case which as far as I can see is not in any way exceptional. In 14 Bombay 115, Queen-Empress Versus Magan Lal and Moti Lal, the majority of the Court laid down the general rule above mentioned as though it admitted no exception. Scott J. dissented, but it is important to note the terms in which he he did so. He said (p. 120).—"Still it is, in my opinion, that kind of accomplice evidence which a Magistrate after very careful security *with the law present in his mind*, might fairly be sustained in holding trustworthy in spite of the usual restrictive rule". In 35 Madras 247, King Emperor Versus Nilakanta, it was the majority of the court which allowed an exception to the general rule, but here again the qulifications are important. "Consider the evidence of the approvers, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, *consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case* of which evidence is legally admissible. Then if you believe it, act on it even if there is no corroboration in the strict sense of the word." This statement of the duty of the Court in such a case was quoted with approval by Wallis J. in 35 Madras 397 Muthukumaraswami Versus King Emperor, and as far as I know that is as far as any High Court has gone in the direction of allowing exceptions to the general rule applicable to accomplice testimony.

But, as I say, these authorities do not really come in the applicant's way. Neither the trial Judge in his judgment nor the Sessions Judge in the reasons he has given for rejecting the appeal has made any reference to the general rule in question and it is not clear, therefore, that the law on the subject really was present to the mind of either Court. Nor does it appear that there were any circumstances which rendered the evidence of these witnesses more credible than ordinary accomplices. The trial Magistrate says "in cases of this nature evidence of this character can only be available," as if he thought that the difficulty of obtaining corroboration were a ground for dispensing with it, but of course it is not. He also says that Ghulam Mahomed, who is "a well-known and notorious badmash with previous convictions to his credit", "naturally needed caution in selling the stolen property" and therefore "selected the present accused to act as intermediary." Granted that the thieves would probably require an intermediary it by no means follows that the applicant Sikander must be that man; they might desire to shield the real one. Then the learned Magistrate says "it is highly improbable that the witnesses would think of implicating the accused in particular if he had no hand in the transaction." But why it should be regarded as highly improbable I do not know, and, if the mere absence of a proved motive for giving false evidence were to be regarded as a good reason for relying on the evidence of accomplices, the general rule which requires corroboration of such evidence would practically be abrogated.

That is all that is in point in the judgment of the trial Magistrate. He does not mention the rather surprising omission of the prosecution to examine the investigating police officer.

The learned Sessions Judge did not write a judgment as he dismissed the appeal under Section 421. But he has given the reasons for his order which are (1) the evidence had been..

"received with due caution" and "correctly weighed", and (2) that no enemity on the part of the witnesses or motive for implicating Sikander Ali have been proved. The latter point I have just dealt with. As to the former I can only say that I am not by any means satisfied. If the Magistrate had said something like this:—"These are witnesses whom, according to the general rule, I ought not to believe without independent corroboration. But, after bearing that rule in mind, I nevertheless do believe the witnesses for these reasons"; and he had then proceeded to give reasons which would stand examination, the case would have been different and I probably should not have interfered. But the case has not been dealt with in that way, and I feel bound to interfere

I set aside the conviction and sentence and direct that the bailbond which has been taken from the applicant should be cancelled.

Application accepted.

Civil Second appeal No. 26 of 1928.

BEFORE MR. R. S. BROOMFIELD I. C. S.

Ghisa Lal son of Lal Chand and Chhoga Lal died represented by Musammat Dakhi widow of Chhoga Lal Mahajan of Beer *Plaintiffs, Respondents, Appellants.*

Versus

Sujan Mal son of Ghisa Lal Mahajan................Defendant, Appellant, Respondent, and (2) Nemi Chand son of Moti L(3) Musammat Gekhan widow of Ghisa Lal (4) Musan Ghisi widow of Gulab Chand of Beer.

Defendants, Respon

1. · Settlement entries · Value of 1—

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BEFORE MR. R. S BROOMFIELD I. C. S.

Ghisa Lal son of Lal Chand and Chhoga Lal died represented by Musammat Dakhi widow of Chhoga Lal Mahajan of Beer *Plaintiffs, Respondents, Appellants.*

Versus

Sujan Mal son of Ghisa Lal Mahajan. ....Defendant, Appellant, Respondent, and (2) Nemi Chand son of Moti Lal (3) Musammat Gekhan widow of Ghisa Lal (4) Musammat Ghisi widow of Gulab Chand of Beer. . .

Defendants, Respondents,

1. Settlement entries Value of :—

Though it has been repeatedly held by the Courts that entries in revenue and settlement records are not in themselves proof of title, yet in this District the rule is otherwise, because by section 68 of Regulation II of 1877 such entries are to be presumed to be correct until the contrary is proved.

2. Suit for redemption - Death of one of the plaintiffs Abatement of :—

In a suit for redemption as the surviving plaintiff can redeem the whole mortgage by virtue of section 91 of the Transfer of Property Act, there can be no question of abatement of the suit on the death of one of the plaintiffs.

3. Redemption suit: Limitation: Burden of proof :—

In a suit for possession of land by redemption of a mortgage the plaintiff is bound to show prima facie that he has a title subsisting at the date of the suit.

11 Allahabad 438 Followed.

The mention of a mortgage in the settlement Register cannot be regarded as prima facie proof that the mortgage is still subsisting.

42 Allahabad 575 F. B. Followed.

Subject matter of the case.

Memo of appeal under Section 100 Civil Procedure Code read with Section 114 Ajmer Regulation IX of 1926 against the Judgment and decree dated the 21st January 1928, passed by the Senior Sub Judge, Ajmer, in Civil Appeal No. 16 of 1927.

Order.—The original suit from which this appeal arises was filed by two plaintiffs Choga Lal and Ghisa Lal, for the redemption of a mortgage of 14 biswas of land vaguely described in the plaint as having been executed by the ancestors of the plaintiffs in favour of the ancestors of the defendants about 40 years before suit. At the trial it was admitted, however, that only half the land had been mortgaged, that is the half share of Keval Ram, grandfather of plaintiff Choga Lal. This plaintiff died during the pendency of the suit, and his legal representatives were not brought on the record. No question of abatement, however, was considered by the trial

Court, which passed a decree in plaintiff Ghisa Lal's favour, in respect of the whole 14 Biswas of land. How this decree came to be passed in the face of plaintiff Ghisa Lal's admission that Keval Ram had mortgaged his share only the record does not explain.

In appeal the First Class Sub Judge held that the trial Court was wrong in passing a decree relating to 14 biswas, and as to that there is no longer any dispute. But the Court of first appeal also held that the suit had abated on the death of Choga Lal, and further that it was barred by time, the plaintiff not having proved that the mortgage was executed within 60 years of the filing of the plaint. These findings are challenged in this second appeal by plaintiff Ghisalal and in opposing the appeal the learned pleader for the respondents contends that, in addition to the above ground for dismissing the suit, the mortgage itself has not been proved by legal evidence.

I will deal with this last point first. There appears to be an incidental reference to the mortgage in suit in two documents exhibits D1 and D2 which were produced by the defendants. But these documents are not proved and cannot be looked at. If the plaintiff wished to rely upon them he should have taken steps to see that they were proved. The only legal evidence on the record is an entry reciting the fact of a mortgage by Keval Ram of his share in the land, which appears in the Settlement Register of the Twenty Years Settlement. As to the date of this settlement there is no evidence. I am simply informed that it was in 1884-85. Now it has been repeatedly held by the Courts that entries in revenue and settlement records are not in themselves proof of title. But, of course, it is open to the legislature to make them legal proof, and it is provided in Section 68 of Regulation II of 1877 that entries in the settlement record shall be presumed to be correct till the contrary is proved. The presumption has not been rebutted in this case, and therefore I must take it that th

entry proves the fact of the mortgage. But it is only the fact of the mortgage which is so proved. The entry does not give the date, nor mention any of the conditions except the amount of the mortgage debt, Rs 59/8/-. The trial Judge has stated in his judgment that the defendents were called upon to produce the original mortgage deed, and did not do so. In that case it was open to the plaintiff to give secondary evidence as to the contents of the documet, but he made no attempt to do so. Without any evidence, either primary or secondary, on that matter it would be obviously very difficult for the Court to decide on what terms the plaintiff should be allowed to redeem. However, as it happens, that question does not arise

Taking now the issue as to abatement, the question is whether Order XXII Rule 3 applies or not. As I have pointed out in my judgment in Civil Revision Application No. 52 of 1927, there seems to be some ambiguity about the words "where...........the right to sue does not survive to the surviving plaintiff or plaintiffs alone". The right to sue did not survive to plaintiff Ghisalal alone, in the sense that he was the only person surviving who had a right to sue. Choga Lal left a widow, and for all we know other heirs, who had a right to sue at least as good as Ghisa Lal's. If the Rule is to be interpreted in that sence, then, the suit obviously abated as far as the deceased plaintiff was concerned. On the other hand, if Ghisa lal had an interest in the mortgage, and could therefore sue to redeem the whole of it by virtue of Section 91 of the Transfer of Property Act, it might be said that the right to sue survived to him alone, in the sense that he was entitled to continue the suit without necessarily joining any other person as a plaintiff; and on that interpretation of the Rule the suit would not abate.

But, in either case, it was obviously necessary for Ghisa Lal to prove that he had an interest in the mortga[illegible]

agree with the Court of first appeal that he has not proved that. Ghisa Lal has stated in his evidence that his father Lal Chand and Keval Ram were brothers. The entry in the register of the Ten Years Settlement (1874) shows that Keval Ram and one Hans Raj were owners of the land in equal shares. I am told that Hans Raj was Lal Chand's father, but I have not found anything on record to show that. There are some vague statements in the evidence to the effect that is joint But it is not proved nor even distinctly alleged, that the land was or is joint in the sense that the two branches of the family were undivided in interest, or that what Keval Ram mortgaged was his undivided share. The oral evidence is very indefinite and unsatisfactory but if it is read along with the entries in the Settlement Records the natural conclusion seems rather to be the other way. What Keval Ram mortgaged appears to have been his separate share in the land, though it may not have been and probably was not divided by metes and bounds. That being so no one is entitled to redeem the mortgage but the widow of Choga Lal, Keval Ram's grandson, and any other heirs that Choga Lal may have left; and, no heirs of Choga Lal having been brought on record, the suit must be held to have abated altogether.

As to the point of limitation, the learned Judge of first appeal has relied, and I think rightly, on the case of Parmanand Versus Sahib Ali, 11 Allahabad 438, where it was held that in a suit for possession of land by redemption of a mortgage the plaintiff is bound to show *prima facie* that he has a title subsisting at the date of the suit. There is no evidence whatever as to the date of the mortgage in this case, unless an inference can be drawn from the fact that the mortgage is not mentioned in the Ten Year settlement. The learned trial Judge was of opinion that it could be inferred from that that the mortgage must have been effected between 1874 and 1885, which he took to be the dates of the two settlements. That even may, perhaps, be a fairly pro-bable inference, but it is not

primafacie proof. The learned counsel for the appellent urged that the entry in the Settlement Register, of 1884-1885, taken with the repitition of the entry in the current Register, may be regarded as proof that the mortgage is still subsisting. But I cannot accept that view. It has not been shown that the settlement records in this case contain any acknowledgment by the mortgagee of the existence of the mortgage; and even if that had been shown, it could not have been inferred that the right to redeem subsists; see Anup Singh Versus Fateh Chand, 42 Allahabad 575 F. B.

In my opinion the decision of the Court of first appeal is right and I dismiss this appeal with costs.

Appeal dismissed.

Civil appeal No. 1 of 1928.

BEFORE MR. R. S. BROOMFIELD I. C. S.

Gudha Co-operative Labour and Saving Society *Limited*, Gudha, registered within Railway limits, now known as the Rajputana Salt Sources Co-operative Labour and Saving Society Limited *Plaintiff Appellant.*

Versus.

Firm Udai Ram Baij Nath, Lower Chitpur Road No. 94, Calcutta through Lala Baij Nath of the said firm.

Defendant, Respondent.

Section 29 of the Co-operative Credit Societies Act Meaning of - Maintainability of suit for transaction in contravention of the Section.

By section 29 of the Co-operative Societies Act a Society is prohibited from making a loan to any person other than a member. Such a loan, if made, is illegal and ultra vires. But the bond on which the transaction is

based does not be-come invalid and unenforceable at law on that account. Such a case is covered by the English rule that money paid in consideration of an executory contract or purpose which is illegal may be recovered back upon repudiation of the transaction, as upon failure of consideration.

Date of judgment :—4/9/1928.

Counsels:—Mr. V. G. Bapat. Bar-at-law for the *Appellant.*

Mr. Chiranji Lal, Advocate for the *Respondent.*

Subject matter of the case.

Appeal from the decision of District Judge. Railway Jurisdiction, Jaipur, dated the 6th January 1928, dismissing the Civil Suit No. 2 of 1925.

Order.—The facts leading to this appeal are very simple. Plaintiff a society registered under the Co-operative Credit Societies·Act of 1912, lent various sums, amounting in all to Rs. 6500, to one Pearey Lal between July and September 1924. On 4th September 1924 Pearey Lal pledged certain securities belonging to him to the society. Section 29 of the Act above mentioned lays down that "A registered society shall not make a loan to any person other then a member", and the society in question has also a Bye-law to the same effect. Pearey Lal was not a member of the society. Subseqnently Defendant 2. a Calcutta firm, got the securities attached in execution of a decree obtained against Pearey Lall in Calcutta. Plaintiff then sued Pearey Lal and Defendant 2 to have it declared that the society has a *prior claim* ever the securities, and that the attachment by the Calcutta Court was illegal.

Various issues were raised at the trial, but the trial Court has dismissed the suit on the priliminary ground that the loan to Pearey Lal was illegal and *ultra vires* " and therefore any transaction arising out of the bond must become invalid and unenforceable at law." Against this decision Plaintiff has appealed.

The appellant's learned counsel admits that the loan transactions were *ultra vires* but submits that they were not unlawful within the meaning of Sections 23 and 24 of the Indian Contract Act. He relies on Smith's Leading Cases, 11th. edition, Vol. 1 p. 384; - A contract is not necessarily illegal because it is unauthorised by the governing statute; and therefore a loan on personal security, though unauthorised by the Friendly Societies Act, 1875, not being illegal may give the society a right of proof against their debtor's estate"; and also on Halsbury's Laws of England, Vol. 15, para 338; "A loan on personal security to a person who is not a member of the society is not illegal in the sense that moneys lent on personal security are irrecoverable: Both these propositions are based on the authority of Re Coltman, 19 ch. Div. 64. So far as they go they support the contention of the learned counsel; but, unfortunately, the case relied upon is not available here, nor is the text of the English Act. It cannot be known, therefore, whether a loan on personal security, or to a person not a member of the society, was expressly forbidden by the English Act, as a loan to a person not a member is forbidden by Act II of 1912. If there was no such express prohibition, but only an absence of authority to do the acts in question, the case of Re Coltman would not be an authority for holding that the transaction with which we are concernee in this case was not an "unlawful" one.

The respondent's learned pleader has referred me to the discussion of "unlawful objects" and "forbidden by law" in Pollock and Mulla's commentary on section 23 pp. 142 to 147. But the particular point that arises here is not dealt with, and the application of the principles of English law, quoted from Pollock on Contract, is not obvious. It may be observed; however, that, if the intention of the Legislature is to be looked at (see Pollock am Mulla P. 147) it can hardly have been the intention of the legislature that the funds of a Co-operative Credit Society should be lost beyond [illegible]ssi[illegible]

of recovery, whenever the officials of the society dispose of those funds in breach of the law.

However that may be, I am not prepared to hold, on the materials at present before me, that the learned trial judge was wrong in his decision finding that the loan by the Society to Pearey Lal was illegal. But the learned judge was, I think, quite wrong in the inference which he proceeded to draw from this in finding, namely that "any transaction arising out or the bond must become invalid and unenforceable at law." That proposition does not necessarily follow from the finding that the loan transaction was void for illegality, as is obvious from the provisions of section 65 of the Contract Act. I do not say that that section itself applies in the present case. There is a conflict of authority as to whether it applies in the case of an agreement which is void abinitio, and perhaps the better view is that it does not. (See Polluck and Mulla pp. 359, 360). But if section 65 does not apply, then the case will be covered by the English rule that money paid in consideration of an executory contract or purpose which is illegal may be recovered back upon repudiation of the transaction, as upon failure of consideration. As far as I can see there is no reason based on law or justice why the Plaintiff society should not be able to recover the money lent by it to Pearey Lal; and if the society has a right to recover the money, I can see no reason, further, why it should not be able to rely upon the security bond without which, it may well be, there would be no hope of recovery.

In my opinion the suit has been wrongly dismissed on the preliminary ground that there is a "vital flaw" which "invalidates the claim abinitio." I set aside the lower court's decree and remand the case for disposal on the merits. Plaintiff will have costs in this Court.

Appeal accepted.

The appellant's learned counsel admits that the loan transactions were *ultra vires* but submits that they were not unlawful within the meaning of Sections 23 and 24 of the Indian Contract Act. He relies on Smith's Leading Cases, 11th. edition, Vol. 1 p. 384; - A contract is not necessarily illegal because it is unauthorised by the governing statute; and therefore a loan on personal security, though unauthorised by the Friendly Societies Act, 1875, not being illegal may give the society a right of proof against their debtor's estate"; and also on Halsbury's Laws of England, Vol. 15, para 338; "A loan on personal security to a person who is not a member of the society is not illegal in the sense that moneys lent on personal security are irrecoverable: Both these propositions are based on the authority of Re Coltman, 19 ch. Div. 64. So far as they go they support the contention of the learned counsel; but, unfortunately, the case relied upon is not available here, nor is the text of the English Act. It cannot be known, therefore, whether a loan on personal security, or to a person not a member of the society, was expressly forbidden by the English Act, as a loan to a person not a member is forbidden by Act II of 1912. If there was no such express prohibition, but only an absence of authority to do the acts in question, the case of Re Coltman would not be an authority for holding that the transaction with which we are concernee in this case was not an "unlawful" one.

The respondent's learned pleader has referred me to the discussion of "unlawful objects" and "forbidden by law" in Pollock and Mulla's commentary on section 23 pp. 142 to 147. But the particular point that arises here is not dealt with, and the application of the principles of English law, quoted from Pollock on Contract, is not obvious. It may be observed; however, that, if the intention of the Legislature is to be looked at (see Pollock am Mulla P. 147) it can hardly have been the intention of the legislature that the funds of a Co-operative Credit Society should be lost beyond possibility

of recovery, whenever the officials of the society dispose of those funds in breach of the law.

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In my opinion the suit has been wrongly dismissed on the preliminary ground that there is a "vital flaw" which "invalidates the claim abinitio." I set aside the lower court's decree and remand the case for disposal on the merits. Plaintiff will have costs in this Court.

Appeal accepted.

Miscellaneous Civil Second appeal No. 23 of 1928.

BEFORE MR. R. S. BROOMFIELD I. C. S.

Munshi Lakshmi Narain Liquidator Co-operative Societies Ajmer *Decree-Holder, Respondent, Appellant.*

Versus.

Lal Chand and Hari Shanker sons of Seth Ghanshyam Das legal representatives of.

Judgment-Debtor, Appellant, Respondent.

Section 24 of the Co-operative Credit Societies Act: whether a bar to execution of liquidator's award against legal representatives of a deceased member: Facts.

A Society was dissolved in 1923. The liquidator made an order under section 42 (b) calling upon a member to contribute his share to the assets. This was on 21/7/1923. On 28/7/1925 an application was made to the Civil court for enforcement of the award under section 42 (5). It then transpired that the member against whom the award was made was dead. Thereupon a fresh application was made on 27/9/1926 against the legal representatives of the deceased member. They pleaded bar of section 24. The trial court over-ruled the objection but the Additional District Judge held otherwise and dismissed the liquidator's application.

Held on second appeal:—

(*i*) *That an appeal against the trial court's order to the District* court was competent.
1926 Lahore 547 (A. I. R.) relied upon 40 Allahabad 89 Distinguished.

(*ii*) That the provisions of section 24 had no application to the case, because that section applied to an order made under section 42 and not to proceedings in execution of such an order.

Rules of construction:—

(*i*) It is a recognised rule of construction that the provisions of a statute shall, if possible, be given a meaning which gives effect to the apparent intention of the legislature.

(ii) It is also a recognised rule of construction that the provisions of a statute should so far as possible be given a meaning which will make them consistent with one another.

1925 Calcutta 203 relied upon.

Date of Judgment :—20 8 28.

Counsels:—Mr. Swaroop Narain, Vakil for the *Appellant.*
Mr. Jasoda Nandan, Advocate for the *Respondent.*

Subject matter of the case.

Appeal under Section 100 Civil Procedure Code read with Section 47 Civil Procedure Code and Section 14 of Regulation IX of 1926 against the judgment and Decree passed by the Additional District Judge, Ajmer, in Civil Appeal No. 43 of 1927 dated the 8th February 1928.

Order.—The facts are as follows. A Co-operative Credit Society in Ajmer was dissolved in 1923, and the liquidator made an order under section 42 (b) of Act II of 1912, calling upon Seth Ghansham Das, a member of the Society, to contribute Rs 775 to the assets. This order was passed on 21/7/1924, and on 28/7/1925 application was made to the Court of the First Class Sub judge for enforcement of the same under Section 42 (5) of the Act. It was then reported that Seth Ghansham Das was dead. A fresh application for execution of the order was made on 27/9/1926 against his sons Lal Chand and Hari Shanker. They objected that the order could not be enforced against the estate of Seth Ghanshamdas because of Section 24 of the Act, which provides that " The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered society as they existed at the time of his decease". The Sub Judge overruled this objection, holding in effect that the limitation of Section 24 only applied to an order made under Section 42 of the Act and not to proceedings in execution of such an order. There was an appeal to the Additional District Judge, was took a different view and held that Section 24 barred execution. The liquidator has come to this court in second appeal.

Three points have been raised by the learned pleader for the appellant:- (1) that it is not proved that Seth Ghansham Das died more than a year before the application was made against his sons; (2) that no appeal lay to the District Court; and (3) that Section 24 has no application under the circumstances.

I do not think there is any substance in the first point. The respondents have asserted that their father died on 22/5/1925, and the learned Additional District Judge has stated in his judgment that it was admitted before him that he had died more than a year before execution was sought against the respondents. The appellant's pleader now says that the fact was not admitted, but only assumed for the sake of argument. But it was obviously the liquidator's duty to challenge the allegation if he did not admit it. Seeing that the first application was dropped on the report of Seth Ghansham Das death, and a fresh application was subsequently made against his sons, and the case was then argued through out on the understanding that he had died more than a year before this second application, it does not lie in the appellant's mouth to complain of the absence of strict proof of the date of death, which his own attitude appeared to render unnecessary.

As to the competence of the appeal, the learned Additional District Junge has relied on Ahmed Yar Versus Co-operative Credit Society, A. I. R. 1926 Lahore 547, where it was held that a Sub Judge's order refusing to execute an award made under the Act is appealable, the reason given being that the provisions of the Civil Procedure Code as to the execution of decrees apply. For the appellant reliance is placed on Mathura Prasad Versus Sheobalak Ram, 40 Allahabad 89, where it was held that no appeal lies from a Sub-Judge's order enforcing an order of a liquidator under the Act. For practical purposes there is no conflict between these authorities. In both of them it is laid down that, when the Rules made

Criminal Reference No. 52 of 1928.

BEFORE MR. G. C. SHANNON I. C. S.

Musammat Parki wife of Moola. *Applicant.*

Versus.

Crown through Uda son of Tanu Dhobi of Ajmer.
Opposite Party.

Facts: A complaint of rape was made to the police.

The police held that the complaint was false and challaned the complainant under section 182 Indian Penal Code. Subsequently the complainant filed a complaint of rape before a competent Magistrate who sent it to the Police for enquiry. Upon receipt of the Police report the Magistrate ordered that the rape complaint be kept pending till the decision of the case against the complainant under section 182 Indian Penal Code.

Upon a Reference by the Additional Sessions Judge.

Held · (a) That the Magistrate's order was improper and could not be sustained The Magistrate should either have dismissed the complaint under section 203 of the Criminal Procedure Code or elected to investigate it further.

5 Allahabad 387 followed.

(2) That the proceedings under section 182 Indian Penal Code should not only be stayed but quashed, as the offence of which the complainant would be guilty if her rape complaint turned out to be false would be one under section 211 and not section 182 Indian Penal Code.

1925 Patna 483, 1925 Allahabad 472, 7 Bombay 184
36 Calcutta 857, 46 Allahabad 905 relied upon.

(3) That when an information to the Police is followed by a complaint to the court based on the same allegations and the same charge, the complaint of the court itself is necessary under section 195 (i) (b) of the Criminal Procedure Code before the court can take cognisance of an offence punishable under section 211 Indian Penal Code in respect of the false charge made to the Police

Three points have been raised by the learned pleader for the appellant:- (1) that it is not proved that Seth Ghansham Das died more than a year before the application was made against his sons; (2) that no appeal lay to the District Court; and (3) that Section 24 has no application under the circumstances.

I do not think there is any substance in the first point. The respondents have asserted that their father died on 22/5/1925, and the learned Additional District Judge has stated in his judgment that it was admitted before him that he had died more than a year before execution was sought against the respondents. The appellant's pleader now says that the fact was not admitted, but only assumed for the sake of argument. But it was obviously the liquidator's duty to challenge the allegation if he did not admit it. Seeing that the first application was dropped on the report of Seth Ghansham Das death, and a fresh application was subsequently made against his sons, and the case was then argued throughout on the understanding that he had died more than a year before this second application, it does not lie in the appellant's mouth to complain of the absence of strict proof of the date of death, which his own attitude appeared to render unnecessary.

As to the competence of the appeal, the learned Additional District Junge has relied on Ahmed Yar Versus Co-operative Credit Society, A. I. R. 1926 Lahore 547, where it was held that a Sub Judge's order refusing to execute an award made under the Act is appealable, the reason given being that the provisions of the Civil Procedure Code as to the execution of decrees apply. For the appellant reliance is placed on Mathura Prasad Versus Sheobalak Ram, 40 Allahabad 89, where it was held that no appeal lies from a Sub-Judge's order enforcing an order of a liquidator under the Act. For practical purposes there is no conflict between these authorities. In both of them it is laid down that, when the Rules made

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BEFORE MR. G. C. SHANNON I. C. S.

Musammat Parki wife of Moola. *Applicant.*

Versus.

Crown through Uda son of Tanu Dhobi of Ajmer.

Opposite Party.

Facts: A complaint of rape was made to the police.

The police held that the complaint was false and challaned the complainant under section 182 Indian Penal Code. Subsequently the complainant filed a complaint of rape before a competent Magistrate who sent it to the Police for enquiry. Upon receipt of the Police report the Magistrate ordered that the rape complaint be kept pending till the decision of the case against the complainant under section 182 Indian Penal Code.

Upon a Reference by the Additional Sessions Judge

Held - (a) That the Magistrate's order was improper and could not be sustained. The Magistrate should either have dismissed the complaint under section 203 of the Criminal Procedure Code or elected to investigate it further.

5 Allahabad 387 followed.

(2) That the proceedings under section 182 Indian Penal Code should not only be stayed but quashed, as the offence of which the complainant would be guilty if her rape complaint turned out to be false would be one under section 211 and not section 182 Indian Penal Code

1925 Patna 483, 1925 Allahabad 472, 7 Bombay 184 36 Calcutta 857, 46 Allahabad 906 relied upon.

(3) That when an information to the Police is followed by a complaint to the court based on the same allegations and the same charge, the complaint of the court itself is necessary under section 195 (1) (b) of the Criminal Procedure Code before the court can take cognisance of an offence punishable under section 211 Indian Penal Code in respect of the false charge made to the Police

The fact that the complaint was not investigated by the court makes no difference.

1925 Patna 483, 43 Calcutta 1152 and 44 Calcutta 650 relied upon.

Date of Judgment:—15/1/1929.

Counsels :—Mr. Anandi Prasad, Advocate for the *Applicant.*
The Public Prosecutor for the *Crown.*

Subject matter of the case.

Forwards record under Section 438 of Criminal Procedure Code.

Order.—This is a reference by the learned Additional Sessions Judge Ajmer-Merwara reporting the order passed by the City Magistrate Ajmer, in connection with the complaint of Mst. Parki against Uda son of Tanu Dhobi. The pertinent facts are these: On 3rd April 1928 Mst. Parki made a complaint to the police that her father-inlaw Uda had committed rape upon her. The police sent her for medical examination but apperently did not follow up the instruction of the Medical Officer to send certain clothes to the Chemical Analyser for examination. Counsel on her behalf stated that the police did not examine the witnesses she cited but recorded the statements of persons named by Uda and held the case was false and sent up a case against Mst. Parki under Section 182 Indian Penal Code. These proceedings were taken in the Court of the Honorary Magistrates B. Bench on July 19th 1928. Subsequently on 14th August 1928 Mst. Parki made a direct complaint of rape to the same Bench who directed her to present it in the Court of a Magistrate who had proper powers as rape is exclusively triable by a Court of Sessions. Her complaint was therefore presented next day to the City Magistrate, who sent it to the police for enquiry - Upon receiving their report the City Magistrate ordered that this complaint should be kept pending till the decision of the case pending against the complainant under Section 182 Indian Penal Code. It is this order that has been reported to this Court as improper.

I am of opinion that the order is improper and cannot be sustained. The learned City Magistrate should either have dismissed the complaint under Section 203 Criminal Procedure Code upon receipt of the Police report or elected to investigate it further. The case is very closely akin to that reported in 5 Allahabad 387. In that a woman Jamni complained that she had been raped by Ram Prasad. The police reported the charge to be false and proceeded against her under Section 182 Indian Penal Code. In the meanwhile Jamni made a complaint in Court charging Ram Prasad with rape. That complaint was not disposed of but the proceedings under Section 182 Indian Penal Code were continued and ended in a conviction. It was held by the High Court that the complaint of rape in the Magistrate's Court should have been enquired into and disposed of before proceedings were taken against the woman under Section 182 Indian Penal Code. The conviction under the latter section was set aside and the Magistrate was ordered to dispose of the rape complaint in due course of law.

The learned Public Prosecutor conceded that the order of the City Magistrate could not be up held, but he opposed the request of Counsel for Mst. Parki for quashing the proceedings under section 182 Indian Penal Code. After considering a large number of authorities quoted by the latter (1925 A. I. R. Patna, 483; ditto, Allahabad, 472; I. L R. 7 Bombay 184, 36 Calcutta 857 and 46 Allahabad 906) I am of opinion that the proceedings under section 182 Indian Penal Code must not be stayed but quashed In the first place there was a definite charge of rape against Uda, and not a mere information. The proceedings against Mst. Parki (if her charge was false) would fall under section 211 Indian Penal Code, and that too under the latter part of the section, a case exclusively triable by the Court of Sessions and so the Bench Magistrates (Second Class powers) would have no jurisdiction to entertain it. Further more when an information to the police is followed by a complaint to the Court based on the same allegations

and the same charge, the complaint of the Court itself is necessary under section 195 (1) b Criminal Procedure Code before the Court can take cognisance of an offence punishable under section 211 Indian Penal Code in respect of the false charge made to the police, on the ground that it was an offence committed in relation to a proceeding in Court. The fact that the complaint was not investigated by the Court makes no difference. (A. I. R. 1925 Patna 483, following 43 Calcutta 1152 and 44 Calcutta 650). The bar imposed by section 195 Criminal Procedure Code must be removed.

I therefore accept the reference and quash the proceedings under section 182 Indian Penal Code in the Bench Court "B" and direct the City Magistrate to dispose of the complaint of rape preferred by Mst. Parki according to law. I think under the circumstances of this case that it is desirable that he should hear the evidence of all the witnesses she tenders. I would at the same time make it clear that the quashing of the proceedings under section 182 Indian Penal Code is no bar to proceeding under section 211 Indian Penal Code if the rape complaint is found to be false and the City Magistrate thinks fit to lodge a complaint against Mst. Parki under Section 211 Indian Penal Code.

Reference accepted.

Short Notes of Important Judgments.

1 (a) Section 5 Limitation Act. Time taken up in prosecuting bonafide proceedings in review is sufficient ground for condoning delay in filing appeal.

45 Calcutta 94 P. C. and 49 Bombay 149 Foll.

(*b*) Appellant is not entitled as of right to exclude such period when the application for review was merely frivolous or designed to gain time.

(*c*) The ultimate failure or success of an application for review can not be regarded as any criterion of the bonafides of the application.

Civil Second appeal No. 40 of 1931.

Date of Judgment 7th April 1932.

Parties:—Pirbhulal son of Ram Gopal of Chachiawas Versus Firm Sobha Ram Sri Ram of Chandosi through Asulal Saraogi of Ajmer.

2. Hindu Law Succession. The ordinary rule under the Mitakshara is that the nearer Sapinda excludes the remote. A nephew will succeed to the whole of the property excluding grandnephews altogether.

50 Allahabad 904 Foll.

Civil Second appeal No. 43 of 1931.

Date of Judgment 5th April 1932.

Parties —Jai Narain and Radha Mohan sons of Pokharlal Kayasths of Ajmer. Versus Kishenchander died represented by Tejkaran and others.

3. Decree on award. Competency of appeal or Revision. An appeal against a decree based on an award is incompetent and it is very doubtful whether even a revision application would lie.

A new objection against an award cannot be allowed in revision.

Civil Revision Application No. 5 of 1932.

Date of Judgment 21st April 1932.

Parties:—Hira died represented by Himta and others of Median. Versus Lala and others Rawats of Median Tehsil, Todgarh.

4. **Court fee on counter-claims.** Under Article 1 of Schedule 1 of the Court Fees Act advalorem fee is to be paid on the full amount of the counter-claim and not merely on the difference between the claim of the plaintiff and the defendant.

45 Allahabad 218 Foll:

Civil Revision Application No. 7 of 1932.

Date of Judgment 4th April 1932.

Parties:—Firm Gulabchand Likhmichand of Beawar Versus The Mahalaxmi Mills Co., Ltd. Beawar.

5. **Appropriation of payments.** Burden of proof.

Where a plaintiff claims a sum of money and admits that certain payments have been made which in themselves would be sufficient to satisfy the debt in suit the burden is clearly upon plaintiff to show that such payments had been properly appropriated to other debts and were not in satisfaction of the debt in suit.

Civil Revision Application No. 17 of 1932.

Date of Judgment 14th April 1932.

Parties:—Rama and Harlal of Nand Versus Radhalal of Bhagwanpura.

6. Uncorroborated Statement of Police Officer. Value to be attached to it.

To accept uncorroborated statement of police officer as sufficient to prove possession, would obviously create a most dangerous precedent for it would do away with the necessity for any independent evidence and leave the way open to the police to implicate any peson against whom their suspicion had been directed.

Criminal Appeals Nos. 45 and 46 of 1931.

Date of Judgment 19th December 1931.

Parties:—Nathia and Rugha Sansis of Toda Rai Singh Versns Crown.

7. (*a*) Reference under 17 whether bars revision. Provisions of the Regulation allowing a reference to the High Court at Allahabad do not oust the revisional jurisdiction of the Judicial Commissioner.

(b) **Failure to frame issue—Decision not withstanding effect of:—**

Where a court decides a suit on an issue which has not been framed the court exercises its jurisdiction with material irregularity.

Civil Revision Application No. 121 of 1931.

Date of Judgment 7th January 1932.

Parties:—Mool Chand and Bhanwar Lal Darzies of Ajmer. Versus Sri Kishen Tailor of Ajmer.

8. Order 13 rule 4 Civil Procedure Code. Where a document has been produced and proved by a party it is entitled to derive its full benefit inspite of the fact that it has not been endorsed by the Court as required by the provisions

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of Order 13 rule 4 Civil Procedure Code because it is a cardinal principle of law that the action or inaction of the court shall not harm any man.

Civil Second appeal No. 30 of 1929.

Date of Judgment 30th October 1929.

Parties: - Ram Kishen son of Ganga Pershad Agarwal of Ajmer. Versus Kashi Ram son of Ram Rikh Agarwal of Ajmer.

9. A suit for recovery of voluntary offerings does not lie.

(1) A suit to recover voluntary offerings or subscription is not of a nature cognisable by the Civil Courts. Therefore a Joshi or a Brahmin has no right to file a suit for recovery of a 'Brit' against his Jujiman or another Brahmin who has recovered it.

36 Bombay 94 not followed.

35 I. C. 345 (Patna)

1929 Patna (A. I. R.) 103

and 6 I. C. 223 (Allahabad) Followed.

(2) In this District the Allahabad High Court decisions are to be followed in preference to those of Bombay or of any other High Court.

Civil Second appeal No. 6 of 1929.

Date of Judgment 8th October 1929.

Parties:—Dhanna Lal son of Mahadeo Brahmin of Gagwana. Versus. Chitar Mal and Ram Pal Brahmins of Gagwana.

10. (1) **Order 13 rule 4. Non compliance by trial Court. Duty of Appellate Court.**

Where the trial court has relied upon documents which have not been endorsed as required by Order 13 rule 4 Civil Procedure Code, the Appellate Court should not rule out of consideration such unendorsed documents but the proper course is to remand the suit for compliance with the provisions of that rule.

5 Lahore 227 and 9 Lahore 4 relied upon.

(2) **Order 41 rule 44. Meaning of :—**

The Appellate Court may finally determine the suit after re-settling the issues, under Order 41 rule 24 Civil Procedure Code when the evidence upon the record is sufficient to enable it to pronounce judgment. This means that the evidence should be sufficient to enable it to pronounce a satisfactory judgment, fair to all parties.

Where an issue has not been raised expressly it cannot be presumed that the parties have adduced all the evidence available to them.

Civil Second appeal No 25 of 1928.

Date of Judgment 15th August 1928.

Parties :—Nasiruddin of Ajmer. Versus. Noor Mohamad and Abdul Gani of Ajmer.

11. (*a*) A litigating party can only succeed secundum allegata et probata and the courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up where it should have been set up. A plaintiff in a suit can only succeed on the cause of action set forth in the plaint or on a cause of action consistent with his pleadings.

33 Bombay 38
1927 Rangoon 118
1926 Rangoon 49
1927 Calcutta 86 relied upon.

(*b*) An intermeddler is a person who interferes wrongfully with property. Consequently there is a legal liability on him but he has no legal right. Such a person cannot be allowed in law or equity to represent the real owner and redeem a mortgage.

Civil Second appeal No. 40 of 1928.

Date of Judgment 2nd May 1929.

Parties :—Seth Umed Mal deceased Versus Bhagwati of Kania.

[Part II.

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Commissioner Ajmer-Merwara.)

B.A., LL.B.

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Miscellaneous Civil Appeal No. 31 of 1932.

BEFORE MR. A. S. R. MACKLIN I.C.S.

Jawahir Mal .... *Decree-Holder, Appellant.*

Versus

L .... *Judgment-Debtor, Respondent.*

(c) of the Civil Procedure Code. Interpretation of :—

on 60 (1) (c) of the Civil Procedure Code a town residence -debtor is attachable when he has another house which is ral purposes.

L. R. 685 relied upon.

e has no habitable house on his land and the house in the one that he actually lives in and uses for the purpose of the house in the town is exempt from attachment. In at he has another house on his land in a ailable for purposes of residence if it

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MR. RADHEY LAL te of Judgment —30th August 1932.

ocate for the *Appellant.*

MR. MOHAN L kil for the *Respondent.*

atter of the case.

der Section 47 and 100 of the Code ainst the Judgment and Decree dated passed by the Additional District Judge, ppeal No. 24 of 1932.

This is a second appeal against the order of l District Judge reversing an order of the dge and exempting the respondent's house from The house in question is situate in Push

town and is admittedly used by the respondent as a dwelling house and for keeping his cattle. It has been held by the first Court that the house is not free from liability to attachment, since the respondent already has another house. That other house is in a dilapidated condition, but would be available to him if it were put in order. The appellate Court however has found that the fact of the respondent having another house which might be put in order is immaterial since the house with which we are now concerned is the only habitable house which he possesses and he thus in fact lives in it as a *bona fide* agriculturist and keeps his cattle there. The question for determination is whether the house is exempt from attachment by the provisions of proviso (c) to Sec. 60 (1) of the Civil Procedure Code. I hold that it is exempt from attachment.

2. The finding of fact of the appellate Court that the house is used by the debtor as a *bona fide* agriculturist as a dwelling house and for keeping his cattle must be accepted, and this finding has not been disputed. But certain cases have been cited to me with the object of showing that the house in question does not satisfy the requirements of the proviso to Sec. 60 (1) of the Civil Procedure Code even though it may be used by an agriculturist as such *bona fide*. The first case quoted is *Manecklal Venilal Vs. Manilal Umedram* (7 B. L. R. 685). In that case it was decided that a town residence of an agriculturist debtor is attachable when the agriculturist has another house used for agricultural purposes. No one is likely to dispute that decision; but it has been quoted because it refers in another place to clause 3 of the Dekkhan Agriculturists Relief Act, which provides that an agriculturist shall be deemed to reside where he earns his livelihood or personally engages in agricultural labour. If this agriculturist had a habitable house on his land and also a house in Pushkar town, it would no doubt be held that he ought to be deemed to reside in the house on his land. But he has no habitable house on his land, and the house in the

town is the one that he actually lives in and actually uses for the purpose of keeping his cattle. I do not see why he should not be deemed to reside in that house. The next case quoted is that of *Muthuvenkatarama Reddiar* Vs. *The Official Receiver of South Arcot* (49 Mad. 227). In that case it has been held that a mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by clause (c); nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for the effective or convenient cultivation of the land. But this case does not seem to take us any further. In the first place the house in Pushkar consists only of two rooms and can hardly be described as a mansion; and in the second place it is obviously not situated at a considerable distance from the land cultivated, since the agriculturist goes to the trouble of keeping his cattle there and this he would hardly do if it were more convenient to keep them any where else. As it is shown that he has no other house, I take it that this house is necessary for the effective and convenient cultivation of the land, and therefore the case quoted is inapplicable. The next case quoted is that of *Radhakisan Hakumji* Vs. *Balvant Ramji* (7 Bom. 530) and is on the same lines and takes us no further. The last case quoted is that of *Nirbhay Lal* Vs. *Kallan* (45 I. C. 546). But in that case the house which was sought to be attached had actually been mortgaged, and it was held to be attachable because it had not been shown as a fact that the house in question was appurtenant to or an appendage of the tenancy of the occupier of the house. But where the property has not been specifically mortgaged, it is not necessary for an agriculturist to show that his house is bound up with his agriculturist holding as an appurtenance or appendage.

3. For these reasons I hold that the respondent's house is exempt from liability to attachment on the ground that it satisfies the requirements of clause (c) to the proviso to Sec. 60 (1) of the Civil Procedure Code. The appeal is therefore dismissed with costs.

Appeal dismissed.

Civil Second Appeal No. 12 of 1932.

BEFORE MR. A. S. R. MACKLIN I.C.S.

Ibrahim Khan son of Allah Noor Khan Musalman of Ajmer Mohalla Kumhar Bao .... *Appellant.*

Versus

Hazrat Noor Khan son of Allah Noor Khan Chobdar Khwaja Sahib, Mohalla Kumhar Bao, Ajmer (Peon Railway General Stores Office .... *Respondent.*

(a) Mohammadan law —Second Marriage of undivorced woman-whether absolutely void-offspring-legitimacy of :—

A marriage of an undivorced woman whose husband is alive is not merely invalid but absolutely void under the Mohammadan law and the children of such marriage are also illegitimate.

1929 Lahore 372 (A. I. R.) Foll.
Mullah's Mohammadan law Paras 204 A and 206.
Dissented from.

(b) Mohammadan law—Effect of acknowledgment as [illegible]—

All that can be effectively acknowl[illegible] of acknowledgment of a principle of law [illegible] if what it is acknowledged to be.

A son of an undivorced woman by a second husband is illegitimate and no amount of acknowledgment by his father can possibly make him legitimate.

15 Allahabad 396 Foll.

Date of Judgment:—5th September 1932.

Counsel:—Mr. Jasodha Nandan Advocate for the *Appellant.*
Mr. Moti Lal Vakil for the *Respondent.*

Subject matter of the case.

Appeal against the judgment and Decree dated the 15th February 1932, passed by the Additional District Judge, Ajmer-Merwara in Civil Appeal No. 71 of 1930.

Order.—This action was instituted by the plaintiff for a declaration that he was the legitimate son of Allah Nur Khan and for certain consequential reliefs. The trial Court held that he was a legitimate son of Allah Nur Khan; but the first appellate Court held that the fact of his mother having a previous husband living at the time of her marriage with Allah Nur Khan prevented the plaintiff from being a legitimate son of Allah Nur Khan. In this second appeal by the plaintiff I come to the same conclusion as the Court of first appeal.

2. In the trial Court and in the Court of first appeal the alleged previous marriage was disputed by the plaintiff, and the alleged marriage with Allah Nur Khan was disputed by the defendant. But some of the plaintiff's own witnesses admitted that his mother had been married to one Hassan Khan and that Hassan Khan was alive when the plaintiff's mother married Allah Nur Khan. It must therefore be taken as a fact that the plaintiff's mother had a previous husband alive when she married the plaintiff's father. Since there is no evidence to suggest that she was a divorced woman at the time of her second marriage, it must also be taken that there was no divorce. On the side of the plaintiff there is evidence to show that Allah Nur Khan acknowledged

(a) A suit based on a Khata Baqi containing an acknowledgment by the debtor is tantamount to a suit on a promissory note.

C. R. No. 75 of 1926 Foll.

(b) Such a suit is governed by the provisions of section 45 of the Contract Act under which all joint promisees have the right to claim performance of the promise.

2. Suit by one joint promisee—Addition of the others after limitation-effect of.

If a suit is brought by only one of the joint promisees and the others are joined after the limitation the result is that the suit is barred by time in its entirety.

6 Calcutta 815 Foll.

Date of Judgment:—9th August 1932.

Counsel:—Mr. Chand Karan Sarda Advocate for the *Applicant.*
Mr. Gajendra Nath Vakil for the *Opposite Party.*

Subject matter of the case.

Application for revision against the order dated the 24th March 1932, passed by the Judge Small Cause Court, Beawar, in suit No. 13 of 1932.

Order.—The suit which has given rise to this revision application was brought by the plaintiff against the defendant on a khata. The defendant contended that the khata was executed not in favour of the plaintiff but in favour of the plaintiff's brother. On the evidence the Small Cause Court Judge decided that the khata was really in favour of the plaintiff and his brother jointly; but it declined to add the plaintiff's brother as a co-plaintiff on the ground that a suit by that co-plaintiff would then have been barred by limitation. Consequently the whole of the suit was dismissed on the ground that it was not maintainable in its present form. Against this order the plaintiff has come in revision.

2. I uphold the order of the Small Cause Court Judge. It has been decided in the case of *RamChander* Vs. *Sheo Nath* (C. R. No. 75 of 1926) that a suit on a khata of this nature containing an acknowledgment by the debtors is tantamount to a suit on a promissory note. That being so

this suit is governed by the provisions of section 45 of the Contract Act, which declares that all joint promissees have the right to claim performance of the promise. It follows as a corollary that they must all be on the record. But the suit became time barred as against the plaintiff's brother soon after it was brought by the present plaintiff, and the addition of plaintiff's brother as a co-plaintiff would on the principle laid down in *Ram Sukh* Vs. *Ram Lal* (6 Cal. 815) make it time barred as against the present plaintiff also. It is therefore useless to add him at this stage.

3. In the circumstances of the case I hold that the suit was rightly dismissed and I dismiss this application with costs.

Application dismisied.

Small Cause Court Revision Application No. 31 of 1932.

BEFORE MR. A.S.R. MACKLIN I.C.S.

The B. B. & C. I. Railway Company through its Agent at Bombay .... *Applicant.*

Versus.

Firm Laxmi Narain Chand Mal of Beawar through L. Ram Swarup .... *Opposite Party.*

Section 77 of the Railways Act and Section 15 (2) of the Limitation Act-Interpretation of :

Section 15 (2) of the Limitation Act prescribes that the period of any notice required by law shall be excluded from the period of limitation.

But Section 77 of the Railways Act does not prescribe any such notice. It only contemplates a submission of claim. The period of such a submission cannot therefore be excluded within the meaning of section 15 (2) of the Limitation Act.

Date of Judgment. 10th August 1932.

Counsel.—Mr K.S. Mathur Advocate for the *Applicant.*
Mr. Nathulal Ghiya Vakil for the *Opposite party.*

(a) A suit based on a Khata Baqi containing an acknowledgment by the debtor is tantamount to a suit on a promissory note.

C. R. No. 75 of 1926 Foll.

(b) Such a suit is governed by the provisions of section 45 of the Contract Act under which all joint promisees have the right to claim performance of the promise.

2. Suit by one joint promisee—Addition of the others after limitation-effect of.

If a suit is brought by only one of the joint promisees and the others are joined after the limitation the result is that the suit is barred by time in its entirety.

6 Calcutta 815 Foll.

Date of Judgment :—9th August 1932.

Counsel.—Mr. Chand Karan Sarda Advocate for the *Applicant.*
Mr. Gajendra Nath Vakil for the *Opposite Party.*

Subject matter of the case.

Application for revision against the order dated the 24th March 1932, passed by the Judge Small Cause Court, Beawar, in suit No. 13 of 1932.

Order.—The suit which has given rise to this revision application was brought by the plaintiff against the defendant on a khata. The defendant contended that the khata was executed not in favour of the plaintiff but in favour of the plaintiff's brother. On the evidence the Small Cause Court Judge decided that the khata was really in favour of the plaintiff and his brother jointly; but it declined to add the plaintiff's brother as a co-plaintiff on the ground that a suit by that co-plaintiff would then have been barred by limitation. Consequently the whole of the suit was dismissed on the ground that it was not maintainable in its present form. Against this order the plaintiff has come in revision.

2. I uphold the order of the Small Cause Court Judge. It has been decided in the case of *RamChander* Vs. *Sheo Nath* (C. R. No. 75 of 1926) that a suit on a khata of this nature containing an acknowledgment by the debtors is tantamount to a suit on a promissory note. That being so

this suit is governed by the provisions of section 45 of the Contract Act, which declares that all joint promissees have the right to claim performance of the promise. It follows as a corollary that they must all be on the record. But the suit became time barred as against the plaintiff's brother soon after it was brought by the present plaintiff, and the addition of plaintiff's brother as a co-plaintiff would on the principle laid down in *Ram Sukh* Vs. *Ram Lal* (6 Cal. 815) make it time barred as against the present plaintiff also. It is therefore useless to add him at this stage.

3. In the circumstances of the case I hold that the suit was rightly dismissed and I dismiss this application with costs.

Application dismisied.

Small Cause Court Revision Application No. 31 of 1932.

BEFORE MR. A.S.R. MACKLIN I.C.S.

The B. B. & C. I. Railway Company through its Agent at Bombay .. . . *Applicant.*

Versus.

Firm Laxmi Narain Chand Mal of Beawar through L. Ram Swarup .... *Opposite Party.*

Section 77 of the Railways Act and Section 15 (2) of the Limitation Act. Interpretation of :

Section 15 (2) of the Limitation Act prescribes that the period of any notice required by law shall be excluded from the period of limitation.

But Section 77 of the Railways Act does not prescribe any such notice. It only contemplates a submission of claim. The period of such a submission cannot therefore be excluded within the meaning of section 15 (2) of the Limitation Act.

Date of Judgment. 10th August 1932.

Counsel:—Mr K.S. Mathur Advocate for the *Applicant.*
Mr. Nathulal Ghiya Vakil for the *Opposite*

Subject matter of the case

Application for revision under Section 25 of the Provincial Small Cause Courts Act IX of 1887 against the Judgment and Decree dated the 18th November 1931, passed by the Judge Small Cause Court, Beawar, in suit No. 748 of 1931.

Order.—This is an application under Section 25 of the Small Cause Court Act for revision of an order of the Small Cause Court Judge of Beawar decreeing the plaintiff's claim against the B. B. & C. I. Railway Company. The claim arose out of damage caused by rain to a consignment of tobacco on 15th May 1930. Various points were raised in the defence, including the point of limitation. On all points it was found against the company, and the company has now applied in revision on the same points.

2. I do not purpose to discuss more than the point of limitation since in my opinion the suit must fail on that ground. The suit was brought on 1st July 1931, that is to say on the first day after the vacation Prima facie it ought to have been brought on 15th May 1931; but the lower Court has held that a notice of claim given by the plaintiff to the company extended the period of limitation by one week and therefore brought the last day of limitation within the vacation. On another ground too the Court was of opinion that the suit was within time, since the defendant company wrote a letter on 10th June 1930, and that letter has been taken to be an acknowledgment of liability within the meaning of Section 19 of the Limitation Act. On both these points I cannot help thinking that the judgment of the Small Cause Court Judge is so clearly wrong that I ought to interfere in revision.

3. As to the first point, Section 77 of the Railway Act prescribes that no suit can be brought against a Railway Company for damage to goods unless a claim has been preferred to the Company within six months. Section 15 (2)

of the Limitation Act prescribes that the period of any notice required by law shall be excluded from the period of limitation. It follows that, if Section 77 prescribes such a notice as is contemplated by Section 15 of the Limitation Act then the period of notice (whatever may be the legal period) can be excluded from limitation. But I am unable to find that Section 77 of the Railway Act prescribes any notice at all. The notice referred to in Section 15 of the Limitation Act obviously means a notice of suit, whereas all that is contemplated by Section 77 of the Railway Act is a notice of claim. It is obvious that a person can make a claim against a Railway Company without intending to sue the company, and that a claim for compensation is not in itself tantamount to a threat to sue. With all respect to the learned Judge who decided the case reported in *B. & N. W. Railway Company* Versus *Ram Saruphal* (70 I. C. P. 109) I cannot see any justification for their finding that Section 77 of the Railway Act prescribes any sort of notice of suit: and I am not aware of any case in which that decision has been quoted with approval. Limitation cannot here be saved by Section 15 of the Limitation Act.

4 The next question is how far it can be saved by Section 19 of the Limitation Act It is contended that the Railway Company's letter of 10th June 1930, is an acknowledgment of liability within the meaning of Section 19 of the Limitation Act. That letter runs as follows —

"I would here point out that the damage has been reasonably assessed without prejudice by my Travelling Claims Inspector, Ajmer with the help of an assessor who was specially brought to assess the damages, and you are therefore not justified in refusing to effect delivery of the bags on this settlement." It is contended before me that the words "on this settlement" imply that the matter was settled and that the plaintiff was entitled to expect the company to pay him a sum of Rs. 225/- which was the amount at which the damage was assessed by the Travelling Claims Inspector. It is also

contended (and it has been so held by the lower Court) that the words" without prejudice have no meaning. In support of this the Judicial Commissioner's decision in the case of the *B. B. & C. I. Railway Company* Vs. *M. S. Rati Ram Gheesa Ram* (C. R. No. 1 of 1927) has been quoted. But the lower Court has completely misunderstood the effect of that decision. What was decided was that the particular letter under discussion containing the words "without prejudice" was an acknowledgment, because the words "without prejudice" had no meaning in connection with that letter and because the rest of the letter was an obvious acknowledgment of a certain degree of liability. To say (as the lower Court in effect has said) that the words "without prejudic" can never be of effect in disclaiming liability is manifestly wrong. The plain English of the Railway Company's letter in this case is that the company did not accept liability but that the amount of damage caused could be valued at Rs. 225/-. It was very necessary for the amount of damage to be assessed in case the company were afterwards held liable. But to say that the company ever accepted liability is clearly wrong. If they did not accept liability, it follows that Section 19 of the Limitation Act cannot apply.

5. For these reasons I set aside the order of the Lower Court and hold that the suit was time barred and must be dismissed with costs throughout.

Application accepted.

Small Couse Court Revision Application No. 34 1932.

BEFORE MR. A. S. R. MACKLIN. I. C. S.

Sheo Narain son of Ram Chander Mahajan of Ramsar

Plaintiff-Applicant.

Versus.

Hukma son of Sheo Baksh (2) Chitar son of Kajja Jat (3) Chitar son of Deva Gujar (4) Balu son of Dhanna Jat (5) Suraj Mal son of Onkar Jat (6) Behari Lal son of Narain Mahajan (7) Jawahara son of Sheo Nath Jat (8) Mool Chand son of Har Narain (9) Jamna Lal son of Ganesh Brahmin (10) Jagrup son of Moda Jat (11) Hindu son of Moda Gujar (12) Chitar son of Onkar Mahajan (13) Deva son of Daya Ram Jat of Sanparda *Defendants, Opposite Party.*

(*a*) **Oaths Act-Application of:—**

The Oaths Act provides for oaths taken before a judicial body and not to oaths taken in any other circumstances. Parties can agree upon any oath by private agreement.

(*b*) **Reference in a suit without an order of the court-Effect of:**

Where in a suit parties have referred their differences to arbitration without an order of the court and an award is made, a decree can not be passed by the court in terms of the award under the provisions relating to arbitration.

51 Bombay 908 Foll.

F. B.

(*c*) **Order 23 rule 3 Civil Procedure Code-Whether applicable in such a case:**

In such a case however the transaction may be regarded as a compromise or an adjustment and a decree may be passed in terms of it under Order 23 rule 3 C. P. C.

47 Allahabad 637 dissented from

51 Bombay 908 Foll.

F. B.

(*d*) **Small Cause Court Revisions-Scope of:**

If

Court taken by the Small Cause

if it disagreed with it.

Date of Judgment 17th August

Counsel —Mr. Kaushal Das Vakil for the applicant Mr. Sri Lal for the Opposite Party.

contended (and it has been so held by the lower Court) that the words" without prejudice have no meaning. In support of this the Judicial Commissioner's decision in the case of the *B. B. & C. I. Railway Company* Vs. *M. S. Rati Ram Gheesa Ram* (C. R. No. 1 of 1927) has been quoted. But the lower Court has completely misunderstood the effect of that decision. What was decided was that the particular letter under discussion containing the words "without prejudice" was an acknowledgment, because the words "without prejudice" had no meaning in connection with that letter and because the rest of the letter was an obvious acknowledgment of a certain degree of liability. To say (as the lower Court in effect has said) that the words "without prejudic" can never be of effect in disclaiming liability is manifestly wrong. The plain English of the Railway Company's letter in this case is that the company did not accept liability but that the amount of damage caused could be valued at Rs 225/-. It was very necessary for the amount of damage to be assessed in case the company were afterwards held liable. But to say that the company ever accepted liability is clearly wrong. If they did not accept liability, it follows that Section 19 of the Limitation Act cannot apply.

5. For these reasons I set aside the order of the Lower Court and hold that the suit was time barred and must be dismissed with costs throughout.

Application accepted.

Small Couse Court Revision Application No. 34 1932.

BEFORE MR. A. S. R. MACKLIN. I. C. S.

Sheo Narain son of Ram Chander Mahajan of Ramsar

Plaintiff-Applicant.

Subject matter of the case.

Application for revision under Section 25 of the Provincial Small Casue Courts Act IX of 1887 against the Judgment and Decree dated the 25th February 1932, passed by the Judge Small Cause Court, Ajmer in suit No. 2413 of 1931.

Order.—In the suit which has given rise to this application the plaintiff sued the fourteen defendants for Rs. 315 together with interest. During the pendency of the suit plaintiff and five of the defendants entered into an agreement to refer the matter to arbitration, but they did not obtain the leave of the Court to do so. The agreement by the plaintiff (to which the agreement by the five defendants exactly corresponds) is Ex. D/2. It runs as follows:— "I Sheo Narain........who have filed a suit for Rs. 315/- with interest against....... (defendants 1-14) shall not conduct the case and it will be considered as dismissed if the above named five persons........go into the temple of Shri Lakshmi Narainji situated in Samperda to take an oath on their sons with Ganges Water in their hands before the five Panches... If the case be conducted the oath which is considered applicable to Hindus shall apply to me, and the appointed panches are hereby authorised to get my suit cancelled after seeing the result of the action to be taken in the temple. After the administration of the oath I will act according to the decision of the Panches........ "The oath was taken accordingly by these five persons with the best substitute for Ganges Water then available, and the Panches duly made their award that the suit should be dismissed. The defendants came to the Judge and asked that the suit should be dismissed accordingly. But the plaintiff objected on the following grounds—, (1) that the adjustment produced by the defendants was not a legal agreement; (2) that there was not a proper reference to arbitration as the reference had not been signed by all the parties to the suit; (3) that undue pressure had been brought on the plaintiff to agree to the reference; and (4) that the plaintiff did not

accept the award and therefore the adjustment could not he recorded. The lower Court, holding that there was no force in these contentions, ordered the adjustment to be recorded under O.23 r.3 and dismissed the suit. The plaintiff has now applied in revision.

2. The grounds of the application are much the same as the objections taken by the plaintiff in the lower Court and may be stated as follows:—

(1) That since the reference to arbitration was not made by all the parties to the suit, both the reference and the award are invalid;

(2) That the oath as administered was not in accordance with the provisions of the Oaths Act, and the award passed upon that oath is therefore invalid;

(3) That as the matter was sub judice, there could be no valid reference to arbitration without the leave of the Court; and

(4) That the transaction cannot be treated as an adjustment of the case, since the plaintiff did not accept the award.

I find against the plaintiff on all points except point No. (3).

3. *Point No. 1.* If this transaction is regarded as a reference to arbitration under schedule 2 of the Civil Procedure Code this objection is material But if it is regarded as a compromise or an adjustment, then the fact that nine of the defendants took no part in these proceedings is immaterial since, whatever the result of the award, their interests could not have been adversely affected. The agreement was that in certain circumstances the suit should be withdrawn against all the defendants, and there was no corresponding agreement that in the event of certain other circumstances the suit should be decreed against the defendants. The defendants [illegible] not signed the reference could have no ground for [illegible] against the reference, and their silence is th[illegible]fore [illegible]

Point No. 2 There is no substance in this point, since the Oaths Act provides for oaths taken before a Judicial body and not for oaths taken in any other circumstances. The present oath was a matter of private agreement.

Point No. 3. The whole of the law on this point is discussed by a Full Bench of the Bombay High Court in the case of *Chanbasappa* VS *Basamgayya.* (51 Bombay 908). The question submitted to the Full Bench for decision was as follows.—"Where in a suit parties have referred their differences to arbitration without an order of the Court and an award is made, can a decree in terms of the award be passed by the Court under O.23 r.3, or otherwise?" All the three judges composing the Court agreed that a decree could not be passed by the Court in terms of the award under the provisions relating to arbitration, namely schedule *2* of the Civil Procedure Code. It follows that this reference cannot be considered strictly as a reference to arbitration so as to entitle the Court to pass a decree in terms of the award under Schedule II; and on this point the plaintiff applicant has a good case.

Point No. 4. But the real point in this case is whether the transaction in question can be regarded not as one of arbitration in the technical sense but as a compromise or adjustment. If it can be regarded as a compromise, then a decree can be passed in terms of it under O.23 r.3. It is contended on behalf of the plaintiff that the refusal of the plaintiff to agree to the award results in there being no element of compromise. O.23. r.3 runs as follows:—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise" the Court shall pass a decree in accordance therewith so far as it relates to the suit." In *Gajendra Singh* Versus *Durga Kunwar* (47 All. 637) Mukerji J. held that an award by referees is neither an adjustment nor the result of a compromise between parties. But this opinion was

dissented from by the Full Bench in *Chanbasappa* Versus *Basingayya* on the ground that the word "compromise" by its derivation includes a reference to private arbitration; and in support of this quotations were made from several standard dictionaries. In Roman Law the word "compromissum" had that meaning. On this ground the High Court of Bombay has held that O.23 r.3 applies to agreements to submit to arbitration even when there was no Court's order authorising a reference to arbitration. Whether there is or is not good judicial authority to the contrary is immaterial for the purposes of the present application. There is at any rate the high judicial authority of the Full Bench of the Bombay High Court for the view taken by the Small Cause Court Judge, and in the circumstances I should not disturb his order even if I disagreed with it. Actually however I agree with him and with the view taken by the High Court of Bombay.

4. The result is that I find no illegality in the decree of the lower Court and dismiss this application with costs.

Application dismissed.

Miscellaneous Civil Second Appeal No. 29 of 1932.

BEFORE MR. A. S. R. MACKLIN I.C.S.

Chatur Bhuj deceased represented by Babu Lal son of Chatur Bhuj Brahmin of Pushkar (Basti Khurd ... *Appellant.*

Versus

Ram Kishendas Chela of Dewa Das Sadhu of Ajmer. *Respondent.*

1. Defect in form of relief claimed-whether material. Its effect on maintainability of a suit.

A defect in the form of relief claimed is immaterial if the relief required has been substantially claimed in the plaint. What the court has to

consider in questions of maintainability is the substance rather than the form of the suit.

1931 Madras 94 (A. I. R.) P. C.

27 Allahabad 325 (at 331) relied upon.

2. *Order 21 rule 103 Civil Procedure Code and Article 11 of the Limitation* Act: Effect of:

The effect of Rule 103 of Order 21 Civil Procedure Code read with Article 11 of the Limitation Act is that an order passed under Rule 101 can be set aside only by a suit brought within one year. Any suit brought to get rid of the effect of an order under Rule 101 whatever its form, whether for declaration or ejectment based upon superior title, must be brought under Rule 103.

53 Bombay 668 Foll.

1926 Calcutta 377. Distinguished.

3. Court Fee payable on suits under Rule 103.

Even if possession is claimed in a suit under Rule 103 based upon title, the proper court fee payable is Rs. 10/- only.

9 Bombay 20.

35 Calcutta 202 P. C relied upon.

4. Section 12 of the Court Fees Act Scope of:

Section 12 of the Court Fees Act refers merely to the determination of the proper court fee payable on any particular class of suit. It is only such determination by the Trial court that is made final by the Section. It does not lay down that the *determination* of the class itself under which a particular suit may fall is also final. An Appellate Court is consequently entitled to decide whether the determination of the class of a suit by the Trial Court is correct or not.

Date of Judgment 3rd September 1932.

Counsel —Mr. Raghu Nath *Advocate for the Appellant.*
Messrs. Mohan Lal Capoor and Shiv Narain Advocates for the *Respondent.*

Subject matter of the case.

Appeal under O.43 r. 1 (u) and section *115 Civil Procedure Code* against the Judgments Section 12 Court Fees Act

and orders dated the $\frac{\text{7th April 1932}}{\text{29th March 1932}}$, passed by the Additional District Judge, Ajmer in Civil Appeal No. 163 of 1929.

Order.—In the action which has given rise to this second appeal the Court ordered the suit to be dismissed on two preliminary points, first the insufficiency of the Court-fee stamp and secondly the non-maintainability of the suit. On appeal to the District court it was held that the stamp was correct and the suit in the form presented was maintainable; theappeal was therefore allowed and the suit sent back to the first Court for trial.

2. This second appeal has been presented on three grounds, (1) that section 12 of the Court Fees Act debarred the appellate Court from interfering with the order of the first Court as regards the Court fee payable, (2) that the finding of the appellate Court regarding the maintainability of the suit was incorrect, and (3) that, since the appellate Court sent back the case for trial, it was wrong in awarding the costs of the appeal against the present appellant. As regards this last point, under section 13 of the Court Fees Act the correct procedure would have been to grant a certificate to the plaintiff (present respondent) entitling him to receive back the Court fee paid on the appeal from the treasury. In this respect it is clear that the appellate Court was in error, and this part of its order must be set aside. A certificate for the refund of the Court fee paid on the first appeal should be granted to the respondent to this appeal.

3. The facts of the case are that the plaintiff obtained a decree against certain persons, but in execution of the decree on obstruction by the present defendant an order under rule 101 of 0.21 was passed in favour of the defendant. In order to have that order set aside it was necessary for the plaintiff to file a suit under rule 103 of O 21 Rule 103 is as follows:— "Any party, not being a judgment debtor, against whom an

consider in questions of maintainability is the substance rather than the form of the suit.

1931 Madras 94 (A. I. R.) P. C.

27 Allahabad 325 (at 331) relied upon.

2. Order 21 rule 103 Civil Procedure Code and Article 11 of the Limitation Act: Effect of:

The effect of Rule 103 of Order 21 Civil Procedure Code read with Article 11 of the Limitation Act is that an order passed under Rule 101 can be set aside only by a suit brought within one year. Any suit brought to get rid of the effect of an order under Rule 101 whatever its form, whether for declaration or ejectment based upon superior title, must be brought under Rule 103.

53 Bombay 668 Foll.

1926 Calcutta 377. Distinguished.

3. Court Fee payable on suits under Rule 103.

Even if possession is claimed in a suit under Rule 103 based upon title, the proper court fee payable is Rs. 10/- only.

9 Bombay 20.

35 Calcutta 202 P. C relied upon.

4. Section 12 of the Court Fees Act Scope of:

Section 12 of the Court Fees Act refers merely to the determination of the proper court fee payable on any particular class of suit. It is only such determination by the Trial court that is made final by the Section. It does not lay down that the determination of the class itself under which a particular suit may fall is also final. An Appellate Court is consequently entitled to decide whether the determination of the class of a suit by the Trial Court is correct or not.

Date of Judgment 3rd September 1932.

Counsel.—Mr. Raghu Nath Advocate for the *Appellant.*
Messrs. Mohan Lal Capoor and Shiv Narain Advocates for the *Respondent.*

Subject matter of the case.

Appeal under 0.43 r. 1 (u) and section *115 Civil Procedure Code* against the Judgments Section 12 Court Fees Act

and orders dated the $\frac{\text{7th April 1932}}{\text{29th March 1932}}$, passed by the Additional District Judge, Ajmer in Civil Appeal No. 163 of 1929.

Order.—In the action which has given rise to this second appeal the Court ordered the suit to be dismissed on two preliminary points, first the insufficiency of the Court-fee stamp and secondly the non-maintainability of the suit. On appeal to the District court it was held that the stamp was correct and the suit in the form presented was maintainable; theappeal was therefore allowed and the suit sent back to the first Court for trial.

2. This second appeal has been presented on three grounds, (1) that section 12 of the Court Fees Act debarred the appellate Court from interfering with the order of the first Court as regards the Court fee payable, (2) that the finding of the appellate Court regarding the maintainability of the suit was incorrect, and (3) that, since the appellate Court sent back the case for trial, it was wrong in awarding the costs of the appeal against the present appellant. As regards this last point, under section 13 of the Court Fees Act the correct procedure would have been to grant a certificate to the plaintiff (present respondent) entitling him to receive back the Court fee paid on the appeal from the treasury. In this respect it is clear that the appellate Court was in error, and this part of its order must be set aside. A certificate for the refund of the Court fee paid on the first appeal should be granted to the respondent to this appeal.

3. The facts of the case are that the plaintiff obtained a decree against certain persons, but in execution of the decree on obstruction by the present defendant an order under rule 101 of 0.21 was passed in favour of the defendant. In order to have that order set aside it was necessary for the plaintiff to file a suit under rule 103 of 0.21. Rule 103 is as follows:— "Any party, not being a judgment debtor, against whom an

order is made under rule 98 rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit (if any) the order shall be conclusive." The first court found that the suit which the plaintiff was bringing had to be regarded as a suit for possession, and on that ground it was of opinion that it required the Court fee applicable to an ordinary suit for possession. As regards the maintainability of the suit, the prayer clause of the plaint contains the following:—"The plaintiff prays for the following reliefs (a) to declare that the defendant has no proprietory rights in the property mentioned in para 2 of the plaint and to obstruct in possession. Orders for ejectment may be passed in execution of decree No. 99 of 1915 against the defendant." In view of the wording of the prayer clause the first Court held that the suit, whatever form it ought to have taken, was in form a suit for a declaration that the defendant had no title rather than a suit for a declaration of the plaintiff's title. On this ground it held that the suit was not maintainable under any law. The District Court came to the conclusion that the suit was in substance a suit for possession based on title but that it was also a suit under rule 103 of 0.21. It accordingly held that the Court fee payable on a suit brought under rule 103 was the proper Court fee and to that extent the plaint had been properly stamped. As regards the maintainability of the suit the District Court looked to the substance of the plaint rather than to the form of the prayer clause and held that the plaint was substantially correct, and that the suit could proceed on the plaint after formal amendment.

4. The issues which arise in this second appeal are as follows —

(*i*) Is the suit maintainable in its present form?

(*ii*) What should be the correct Court fee?

(*iii*) Was it open to the first appellate Court to pass orders as regards the Court fee payable in view of Section 12 of the Court Fees Act?

Issue No. I.—A perusal of the plaint makes it clear that the plaintiff is alleging his own title to the property as against defendant independently of any title that he may have acquired by virtue of his decree, and that the words in the prayer clause asking for a declaration that defendant has no title are a defect of form only and not of substance. When the defect is one of form only, the defect is immaterial provided that the relief required has been substantially claimed in the plaint—see the case of *Sundara Ganapathi Mudali* versus *Daivasikamani Mudali* (1931 Mad. 94). This aspect of the case was not touched upon by the present appellant and all that the learned counsel could say on that point was that the plaint was so confused as to make it quite impossible for the defendant to know what case he had to meet. To me the plaint read as a whole makes it clear what case the defendant has to meet, and the frame of the issues makes it clearer still The defendant has to meet a case of ejectment based upon plaintiff's title independent of the decree in his favour. The whole argument of the learned counsel for the appellant on the question of maintainability was directed to the alleged distinction between a suit brought under rule 103 (to get rid of an order under rule 101 giving possession to the defendant) and a suit under some other law for ejectment by virtue of the plaintiff's superior title. He contended that under rule 103 what the plaintiff had to show was that the position of the defendant was in some way linked with the position of the judgment-debtors under the decree which the plaintiff holds, so that the defendant would be bound by the decree. He further argued that in a suit under any other law the plaintiff would have to establish his own title and seek ejectment of the defendant on the strength of the plaintiff's superior title. He contended that the suit as

order is made under rule 98 rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit (if any) the order shall be conclusive." The first court found that the suit which the plaintiff was bringing had to be regarded as a suit for possession, and on that ground it was of opinion that it required the Court fee applicable to an ordinary suit for possession. As regards the maintainability of the suit, the prayer clause of the plaint contains the following:—"The plaintiff prays for the following reliefs (a) to declare that the defendant has no proprietory rights in the property mentioned in para 2 of the plaint and to obstruct in possession. Orders for ejectment may be passed in execution of decree No. 99 of 1915 against the defendant." In view of the wording of the prayer clause the first Court held that the suit, whatever form it ought to have taken, was in form a suit for a declaration that the defendant had no title rather than a suit for a declaration of the plaintiff's title. On this ground it held that the suit was not maintainable under any law. The District Court came to the conclusion that the suit was in substance a suit for possession based on title but that it was also a suit under rule *103* of *0.21*. It accordingly held that the Court fee payable on a suit brought under rule 103 was the proper Court fee and to that extent the plaint had been properly stamped. As regards the maintainability of the suit the District Court looked to the substance of the plaint rather than to the form of the prayer clause and held that the plaint was substantially correct, and that the suit could proceed on the plaint after formal amendment.

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Ramjee Jadhav versus *Dattatrya Ram Krishna* (53 Bombay 668). The learned counsel has referred me to a contrary authority in the case of *Ambika Charan Bhaka* versus *Ram Prasad Chatterjee* (1926 Calcutta 377), which decides that there is nothing to prevent a decree-holder from bringing a suit under a title entirely independent of his decree after the period of one year. That may be correct in theory. But the practical difficulty in the way of the decree-holder obtaining relief in such a suit lies in the last words of rule 103, namely the impossibility of getting rid of an order under rule 101 unless the suit is brought under rule 103, and that means within the period of one year. This is an aspect of the case which does not seem to have struck the learned Judges when they gave their decision that a suit could be brought independently of rule 103.

6. I have gone into this matter at some length because so much of the argument of the learned counsel was devoted to it under a misapprehension of the real effect of rule 103. But, as I have already said, what has to be considered is the substance rather than the form of the suit; and in substance this suit is a suit for ejectment based upon plaintiff's title brought within the period of limitation prescribed for a suit to set aside an order under rule 101. The suit is therefore maintainable.

Issue No. 2.—It has been contended by the learned counsel that the plaintiff cannot succeed in this suit unless he establishes his title and seeks for possession, and that the Court fee proper to a suit for possession based upon title is therefore necessary. This ignores the decision given in the case of *Dhono Sakharam Kulkarni* versus *Govind Babaji Kulkarni* (9 Bombay 20) upheld by the Privy Council in the case *Phul Kunari* versus *Ghanshyam Misra* (35 Calcutta 202). This is a suit under rule 103, and, whatever may be the subject matter of the suit, the Court fee payable is Rs. 10/-

Issue No 3 —The learned counsel refers to section 12 (1) of the Court fees Act and argues that the determination of the Court fee by the first Court precluded the appellate Court from coming to a different determination. But section 12 (1) must be construed strictly. It runs as follows:— "Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed and such decision shall be final as between the parties to the suit." This refers merely to the determination of the Court fee on any particular class of suit. It does not say that the determination of the class of suit shall be final. The first Court held that this was a suit for possession and that a certain fee was payable. What the appellate Court decided was not that the first Court was wrong in its determination of the Court fee for that particular class of suit, but that the suit came under a different class, namely the class of suits filed under rule 103. It was therefore open to the District Court in appeal to reverse the order of the first Court as regards the Court fee.

7. I have already held that the present appellant cannot be saddled with the costs of the first appeal, and that the appropriate method of dealing with the costs of that appeal is the issue of a certificate to the appellant in that appeal (the present respondent). In other respects this appeal is dismissed with costs.

Appeal dismissed.

Civil Second Appeal No. 37 of 1932.

BEFORE MR. A. S. R. MACKLIN I.C.S.

Roa Sahib Thakur Nathu Singh of Ras Marwar, through L Akhey Raj Kamdar of Thikana Ras Mukhtar

Decree-Holder, Appellant.

Versus.

Adam son of Peer Bux Musalman Nariyn of Beawar *Surety Respondent and* (2) Abdul Aziz and (3) Ghewar Chand .... *Judgment-Debtors, Respondent.*

1. Insolvency of principal debtor—whether absolves surety:—

The insolvency of a principal debtor does not absolve his surety from liability to pay the decretal amount.

28 Allahabad 387 Dissented from

2 Stay of execution by Appellate court on furnishing security—acceptance by lower court of surety bond beyond time allowed Effect of:—

Where the execution of a decree has been stayed by the Appellate court on the judgment-debtors furnishing security for the decretal amount within a specified period the Executing court acts without jurisdiction if it accepts the security beyond the time so specified. But this does not affect the liability of the surety to the decree-holder under the bond which has been accepted and on which execution of the decree has been stayed, even though the Executing court had no authority to accept it.

Date of Judgment 12th September 1932.

Counsel —Mr. Govind Prasad Advocate for the .. .. *Appellant.*
Mr. Moti Prasad Vakil for the ... ... *Respondents.*

Subject matter of the case.

Memo of appeal under Section 47 and 100 and O. 42 r. 1 of the Code of Civil Procedure against the order dated the 13th April 1932, passed by the Additional District Judge, Ajmer, in Civil Appeal No. 7 of 1932.

Order.—The matter which has given rise to this second appeal arose out of execution proceedings. The judgment debtor applied in appeal for stay of execution. The appellate Court granted an interim stay and passed a further order in the following words—"The order is made absolute on the appellant filing security for the decretal amount within 15 days to the satisfaction of the lower Court." A copy of this order was sent to the lower Court for compliance In due course a surety bond was presented, but the surety himself

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did not appear. Three days after the expiry of the 15 days fixed in the order for the acceptance of security the present respondent appeared and presented a bond making himself surety for the judgmentdebtor. The judgment-debtor has now applied in Insolvency, and the decree-holder has applied for execution of his decree against the surety. The executing Court allowed execution to proceed against the surety, partly on the ground that the present surety's applicatiou to be made surety might be regarded as an extension of the other surety's application to be made a surety so as to bring the present surety bond within the period of 15 days fixed by the appellate Court's order, and partly because it was the present surety's own fault that he offered himself as a surety after 15 days and on that account he cannot be allowed to take advantage of his own wrong.

Against this order the surety came in appeal to the District Court. The Additional District Judge set aside the order of the executing Court on the ground that the Court which accepted the surety bond had no authority to accept it after the period of 15 days had elapsed and that the bond itself was therefore invalid. The learned Judge found no force in the reasoning of the decretal Court that the present surety bond was merely a continuation of the surety bond for the surety who did not personally appear. The decree-holder has now presented a second appeal against the order of the first appellate Court refusing to allow execution to proceed against the surety.

A preliminary point is taken by the respondent-surety to the effect that the insolvency of a principal absolves his surety from all liability to the execution of a decree. This contention is based upon the decision in the case of *Langtiu Pande* Versus *Baija Nath Saran Pande* (28 Allahabad 387). That case was concerned with a point of limitation, namely whether the decree-holder had taken any step in aid of execution so as to bring his application for execution within

time. One of the steps alleged by the decree-holder to have been taken in aid of execution was an application in execution against the surety of the judgment-debtor during the pendency of the judgment-debtor's insolvency. The learned Judge who decided the case in the High Court held that the application in execution against the surety could not be regarded as an step in aid of execution because it was not a lawful application. He based his finding upon Section 336 of the Civil Procedure Code of 1882, which corresponds to a large extent with Section 55 of the present Code. From the wording of Section 336 of the Code of 1882 he deduced the principle that no application for execution can be made against a judgment debtor's surety when proceedings in insolvency are pending against the judgment-debtor. I can find no authority far this proposition in the words of Section 55 as it exists at present nor any subsequent judicial approval of it. The decision moreover was given by a single Judge, and no specific authority is quoted in the judgment in support of it. In the circumstances I regret that I am unable to accept it.

The next objection taken by the surety as a preliminary point is based upon the principle that there can be no estoppel on a point of law. It is contended that the surety is not estopped from contesting the validity of his bond merely by reason of the fact that he presented as valid a bond which was really invalid. But the objection is beside the point. There is no question of the surety being estopped from contesting the validity of the bond.

It must, I think, be held that the Court which accepted this bond acted without jurisdiction. That being so, the question is whether the surety is bound by his own bond i[illegible] view of the fact that the Court had no jurisdiction to acce[illegible] it. I hold that he is bound.

It is contended on behalf of the surety that sir[illegible] Court had no authority to accept the bond it must be[illegible] ded as not having accepted the bond at all; or

alternative that it accepted the bond under a misapprehension and therefore did not really accept it. As to the first part of this argument, it is idle to pretend that the Court did not accept the bond when it manifestly did accept the bond. If any proof were needed, it is to be found in the fact that the order to stay execution remained in operation. As to the second contention, namely that the acceptance was given under a misapprehension, it appears from the rather scanty record of this case that the Court which accepted the bond was under the misapprehension that it had been presented within the 15 days prescribed by the appellate Court. But here again the result is the same; the bond was in fact accepted, and its acceptance is proved by the fact that the stay order continued in operation.

The last point taken on behalf of the surety is that all parties were to blame, including the Court which accepted the bond, the appellate Court which allowed the stay order to continue, the surety who presented the bond after time, and the decree-holder who did not present an appeal or application against a stay order obtained improperly. It is suggested therefore that matters ought to be restored to the position that they were in at the time when the error first arose. But this is of course impracticable, since the judgment-debtor has now become an insolvent.

All that has been said against these proceedings against the surety really amounts to this, that the Court which accepted the bond had no jurisdiction to accept it, and the surety is therefore not bound by his bond. The arguments take us no further than a re-statement of the question at issue in one form or another; they do not help us to decide the question. In my opinion much more can be said on the other side. There was no compulsion for the surety to stand surety he stood surety of his own accord and at his own request; and owing to the execution of the bond by the surety and the consequent continuation of the stay of execution, the decree-

holder was deprived of his remedy against the judgment-debtor untill it was too late. That the surety should be bound by his bond, even though the Court had no authority to accept it, is no injustice to the surety; it is only in accordance *with his own original intention.* But *to* allow the surety to escape liability is a clear injustice to the decree-holder. Whether or no the Court which accepted the bond had authority to accept the fact remains that the surety promised to hold himself liable for the decree, and on the faith of that promise the decree-holder has been kept out of his remedy till now. In the absence of clear judicial authority discharging the surety from liability, I hold that he cannot escape liability.

For these reasons I set aside the order of the first appellate Court and direct that execution may proceed against the surety. Costs throughout will be paid by the surety.

Appeal accepted.

Civil Second Appeal No. 11 of 1932.

BEFORE MR. A. S. R. MACKLIN I.C.S.

Narsingh Das son of Gopal Das of Ajmer .. *Appellant.*

Versus.

Narain Das son of Lachman Sunar died represented by (1) Jagan Nath minor under the guardianship of Hazari (2) Hazari and (3) Ram Bux of Ajmer .... *Respondents.*

(a) Second appeal-Grant of proper relief by High Court even though not claimed in lower courts. Order 7 rule 7 Civil Procedure Code Effect of:

In view of Order 7 rule 7 Civil Procedure Code there is nothing to prevent the High Court in Second Appeal from granting the proper relief to plaintiff even though it was not claimed by him in the lower courts a!

the facts on which such a relief can be granted are sufficiently stated in the plaint.

27 N. L. R. 327

27 Allahabad 321 (at 331) P. C. relied upon.

(b) Private sale in execution of mortgage-decree-Effect of under section 92 Transfer of Property Act.

A private sale in the course of execution of a mortgage decree is invalid but if the mortgage decree has been paid off by the purchaser he steps into the shoes of the mortgagee under section 92 of the Transfer of Property Act and can recover the mortgage amount from the properties sold to him.

1926 P. C. 109 (A I. R.) relied upon.

(c) Inconsistent reliefs: Validity of

Inconsistent reliefs can be claimed in the alternative.

Subject matter of the case.

Memo of appeal under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated the 26th October 1931, passed by the Additional District Judge, Ajmer in Civil Appeal No 98 of 1929.

Order.—The history of the litigation which has given rise to this second appeal is as follows:—

The property in suit originally belonged to one Chotu Sunar and it was mortgaged by him to certain mortgagees. The mortgagees sued the mortgagor and obtained a decree for sale against the heirs of Chotu and one Narain Das who had bought the equity of redemption of certain property. It appears that Narain Das also bought the property for which he held the equity of redemption; but he bought it subject to the mortgage. When the property was put to sale under the decree it was found that the price to be realised was not enough to pay the mortgage and it was therefore sold privately to Narsingh Das. Narsingh Das accordingly paid the money, and on the payment of the purchase price the Court ordered the mortgage to be paid off.

Narsingh Das thereupon sued for possession of the property which he had bought. It was held by the first Court that the plaintiff could be given possession of all the property except two shops, but that he could not be given possession of those two shops because his vendor had no title to them at the time of the sale. This decision was npheld in first appeal. Narsing Das has now presented this second appeal on the ground that the Courts below ought to have compelled Narainh Das to pay to him the amount which he had paid to liquidate the mortgage on the two shops held by Narain Das.

No such claim was ever made in either of the Courts below. But it is contended by the appellant that, in view O. 7 r. 7 and the decisions of various High Courts, there is nothing to prevent this Court from granting him the relief sought for even at this late stage. With that contention I agree. The authorities have been fully reviewed in the case of *Gulabgir* Versus *Nath Mal* (27 N. L. R. 327). In the case of *Muhammed Munawar Ali* Versus *Razia Bibi* (27 Allahabad 321) at page 331) the Privy Council held that, where the facts on which the plaintiff relied were sufficiently stated in the plaint and the prayer clause contained a prayer for such further relief as the Court found just (or words to that effect), then it was open to the Court to grant such relief. From the facts stated in the plaint it is clear that the plaintiff Narsingh-Das bought the property by permission of the Court in a sale enforced at the instance of the mortgagees, and the equivalent of the mortgage amount was paid to the mortgagee.

But the rule that the Court may give any relief consistent with the pleadings is subject to the provisions that the facts on which relief might be given are contained in the plaint. It is contended by the defendant-respondent that the facts are not all given in this plaint, in as much as it cannot be said from the plaint what proportion the property held by the defendant bears to the whole of the property under mortgage. I do not however think that it was essential to state this

detail in the plaint. Nor do I think that it was necessary (as contended by the defendant-respondent) that the plaintiff should have sued against the whole of the mortgage property. When several properties are covered by one mortgage, it is not necessary for the mortgagees to sue in respect of all the properties, since it may well be that he would prefer to leave untouched the mortgage in respect of those properties which were paying him his interest regularly but would wish to foreclose in the case of those which were unsatisfactory from his point of view; and if he decided to sue against some only of the properties, it would be impossible for him to say in the plaint what proportion of the mortgage was laid upon this property only. This is a matter of detail which in the ordinary way would probably be decided by a Commissioner. The mortgagee at any rate would have no difficulty in getting a decree against those properties against which he sued. The same is the case in the present suit. If the plaintiff is entitled to sue for the mortgage amount at all, it is not necessary for him to state in his plaint exactly what proportion the properties against which he sues bear to the whole of the mortgaged property.

The next question therefore is whether the plaintiff is entitled to sue. I hold that he is so entitled. The evidence in the case shows that he bought the property and thereupon the court directed that mortgage should be paid off. He is therefore entitled to the benefit of Section 92 of the Transfer of Property Act, and becomes subrogated to the mortgagee; and as regards the property whose mortgage he has paid off, he stands in the shoes of the mortgagee (see the case of *Nasiruddin* Versus *Ahmed Husain* 1926 Privy Council 109) and can recover the mortgage amount in the ordinary way.

But it is contended by the defendant respondent that the relief now claimed by the plaintiff as mortgagee is inconsistent with the relief claimed in the suit. In the suit he has

asked for possession of the property by right of purchase, but on its being held that his vendor had no title he sues not as owner but as mortgagee. I do not however think that there is any inconsistency here. If the alternative prayer had been specifically enunciated in the plaint in some such words as "if the Court finds that the sale to the plaintiff was invalid, then in the alternative the plaintiff prays for a relief in respect of the mortgage amount which he had paid", I do not think it likely that any plea of inconsistency would or could have been raised. Such a form of alternative prayer is not unusual. For the same reason I see no inconsistency in such a prayer being put forward in second appeal. In the plaint the plaintiff sued for possession on the ground that he had paid the purchase price. In second appeal he asks for reimbursement of so much of the paid off mortgage amount as was a charge upon the property in dispute.

The orders of both the lower Courts as regards the two shops must be set aside, and the plaintiff be given a decree for reimbursement of the mortgage amount to the extent of the proportion which the value of two shops bore to the value of the whole property under mortgage at the time of the mortgage. The decree will be in the form of a preliminary decree in a mortgage suit and will be directed against the two shops. Since the partial failure of the plaintiff in the Courts below was due to his failure to include a specific prayer in the plaint for the relief now granted, I see no reason to disturb the orders of the lower Courts as regards costs. For the same reason I do not make the costs follow the event in this appeal, but direct that each party to this appeal bear its own costs.

Appeal accepted.

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But it is contended by the defendant respondent that the relief now claimed by the plaintiff as mortgagee is inconsistent with the relief claimed in the suit. In the suit he has

asked for possession of the property by right of purchase, but on its being held that his vendor had no title he sues not as owner but as mortgagee. I do not however think that there is any inconsistency here. If the alternative prayer had been specifically enunciated in the plaint in some such words as "if the Court finds that the sale to the plaintiff was invalid, then in the alternative the plaintiff prays for a relief in respect of the mortgage amount which he had paid", I do not think it likely that any plea of inconsistency would or could have been raised. Such a form of alternative prayer is not unusual. For the same reason I see no inconsistency in such a prayer being put forward in second appeal. In the plaint the plaintiff sued for possession on the ground that he had paid the purchase price. In second appeal he asks for reimbursement of so much of the paid off mortgage amount as was a charge upon the property in dispute.

The orders of both the lower Courts as regards the two shops must be set aside, and the plaintiff be given a decree for reimbursement of the mortgage amount to the extent of the proportion which the value of two shops bore to the value of the whole property under mortgage at the time of the mortgage. The decree will be in the form of a preliminary decree in a mortgage suit and will be directed against the two shops. Since the partial failure of the plaintiff in the Courts below was due to his failure to include a specific prayer in the plaint for the relief now granted, I see no reason to disturb the orders of the lower Courts as regards costs. For the same reason I do not make the costs follow the event in this appeal, but direct that each party to this appeal bear its own costs.

Appeal accepted.

Civil Second Appeal No. 36 of 1932.

BEFORE MR. D. R. NORMAN I.C.S.

Shive Charan son of Sheo Dayal Mahajan Maheshri of Ajmer . *Appellant.*

Versus.

Lala Fateh Lal, Faqir Chand sons of Lala Raghu Nath Singh, Lala Sheo Narain and Birdhi Chand Sons of Lala Sheo Nath Singh Kayastha of Ajmer .... *Respondents.*

Section 102 of the Civil Procedure Code-whether bars Second appeals in rent suits not cognizable by the Small Causes.

A rent suit which is not cognisable under Article 8 of the Provincial Small Cause Courts Act by a court of Small Causes for want of a notification by the Local Government as required by that Article, is not a suit of the nature cognizable by a court of Small Causes within the meaning of Section 102 of the Civil Procedure Code and a second appeal is not barred in such a suit.

23 Madras 547 F. B. } Distinguished
41 Bombay 367 }

42 Calcutta 638 } Followed.
37 I. Cases 980 (Patna) }

3 Rangoon 390 Dissented from

Date of Judgment 23rd January 1933.

Counsel:—Mr. Jasodha Nandan Advocate for the ... *Appellant.*
Mr. Mohan Lal Kapoor Advocate for the ... *Respondents.*

Subject matter of the case.

Memo of appeal under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated the 29th March 1932, passed by the Additional District Judge and Senior Sub-Judge, 1st Class, Ajmer in Civil Appeal No. 5 of 1931.

Order:—This is a second appeal against a decree of the Additional District Judge modifying a decree passed by the Assistant Comissioner in a suit to recover rent of land. A preliminary objection is taken that a second appeal is barred by Section 102 Civil Procedure Code.

2. Section 102 Civil Procedure Code bars a second appeal *in any suit of the nature cognizable by Court of Small Causes* when the value of the subject matter does not exceed Rs. 500/- The point for decision is whether the present suit is of the nature cognizable by a Court of Small Causes. Under art. 8 of the second schedule to the Provincial Small Cause Court Act a suit for recovery of rent other than house rent is excepted from the cognizance of a Court of Small Causes unless the Judge has been invested by the local Government with authority to exercise jurisdiction with respect thereto. No such notification has been issued in Ajmer-Merwara.

3. Mr. Mohan Lal, however, relies on three decisions. The first is *Soundaram Ayyar* Versus *Sennia Naickan* (23 Madras 547) a Full Bench decision. In that case the Court of Small Causes with the requisite territorial jurisdiction had been invested with the necessary powers under Art. 8 but the suit from which the appeal arose was tried as a long cause because the Small Cause Court had not the necessary pecuniary powers. It was held by majority of 4 to 1 that Section 102 applied. Two of the Judges White C. J. and Shephard J. based their decision on the issue of the notification under Art. 8. White C. J. said "It seems to me that Section 586 (now S. 102) of the Code applies to cases which as regards subject-matter would be within, but by reason of the amount claimed are without, the jurisdiction of a Court of Small Causes". It was only Benson, J. who held that apart from the notification Section 102 would apply. The fourth agreeing Judge, Davis J. did not give reasons for his decision. The point next came up for decision in *Sahad ora M* [illegible] Versus *Nabinchand* (42 Calcutta 638). In that there was

tion under Art. 8. The learned Judges distinguished *Soundaram Ayyar* Versus *Sennia Naickan's* case on that ground and held that Section 102 was no bar to an appeal. The same view was taken in *Sadanand Tewari* Versus *Deb Nath Manjhi* (37 I.C. 980) a decision of the Patna High Court. *Sounaram Ayyar* Versus *Sennia Naickan's* case was followed in *Ramkrishna Yeshwant Kamat Adarkar* Versus *The President of the Vengurla Municipality* (41 Bombay 367). But in that case too there was a notification under Art. 8. The last case is *Ma Pan* Versus *Maung Ne U.* (3 Rangoon 390). It was there held that Section 102 barred a second appeal in a suit for rent of land whether there was a notification under Art. 8 or not. Heald J. stated "It can hardly be contended that the action of the Local Government in empowering a particular Judge of a Small Cause Court to exercise jurisidiction in respect of suits for rent of land alters the "nature" of such suits, and unless it does, it would seem to follow that such suits are always" of the nature cognizable by Courts of Small Causes. "That, at any rate, was the view of the Madras High Court". But with all due respect that was not the view of the Madras High Court. It was the view of Benson J. But I can find nothing whatever in the judgments of White C. J. and Shephard J to substantiate that view.

4. The balance of authority is thus against Mr. Mohan Lal's argument He is supported by the judgments of Benson J. and Heald J. But the latter judgment seems to be based on the mistaken supposition that Benson J's judgment represented the view of the Full Bench of the Madras High Court. On the other side there are Calcutta and Patna decisions already quoted Moreover after reading the judgments of White C. J. and Shephard J. I am inclined to think that they would have decided the other way had no notification under Art. 8 been issued.

5. My own view is that the present suit is not one of the nature cognizable by a Court of Small Causes. There is

admittedly a Court of Small Causes having the requisite territorial and pecuniary jurisdiction to try the present suit. To say that a suit is of a nature cognizable by the Court of Small Causes, when it is actually barred by law from being tried by such a Court seems to me a departure from common sense, and I cannot see that it makes any difference whether that bar is an absolute one imposed by the legislature or whether it is a conditional one which the Local Government could have, but actually have not, removed.

6. I therefore disallow the preliminary objection and direct that the appeal be set down for hearing on its merits.

Preliminary Objection Disallowed.

Short Notes of Important Judgments.

1. Public Gambling Act. Means of gaming.

Section 1 and 3.

Means of gaming include any coins used as stake money. They may also be regarded as instruments of gaming and the house in which they have been so used must be regarded as a common gaming house.

Criminal appeal No. 17 of 1932.

Crown Versus Hardeo Mahajan Agarwal of Ajmer.

Dated 6th September, 1932.

2. Commercial usage or custom. Ingredients of

(*a*) A commercial usage or custom must also be ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy.

(*b*) There is no custom amongst Gota workers of Ajmer by which a workman who takes new employment continues liable for any money that may still be owing from him to his old employee and at the same time the new employer also becomes liable for that money to the old employer, either jointly or severally with the workman.

Civil Revision Application No. 93 of 1931.

Amba Lal and Nana Bhai Versus Suraj Mal and Faizu.

Dated 20th August, 1932.

3 Provincial Small Cause Courts Act. Article 35. Test of whether plaint discloses a criminal offence :—

The test of whether the plaint does or does not disclose an offence is whether the statements made in the plaint, if proved, would by themselves and without proof of any further particulars involve the defendant in a conviction of a criminal offence.

Revision application No. 88 of 1932.

Syed Fazal Hussain Versus The Durgah Committee.

Dated 20th September, 1932.

4. Interest by way of damages. Award of:

A plaintiff who has been kept out of his money and to that extent was unable to draw interest at the ordinary bazar rate by lending it to other people is entitled to be awarded interest by way of damages even though no specific evidence was led by him about it.

Revision application No. 122 of 1932.

Bal Singh Versus Ratan Lal.

Dated 7th September, 1932.

5. Claim against legal representatives. Decree when to be passed.

In the event of a claim being proved the court ought to pass a decree for the plaintiff in a suit against the legal representatives of the original debtor even though the original debtor may have left no estate.

13 Bombay 653.

Whether there is any estate left by the deceased is a question to be decided at the time of the execution of the decree.

Civil Revision application Nos. 2 to 4 of 1932.

Rati Ram Versus Mst. Dhapli.

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6. Interpolation in documents. Effect of :

(*a*) Where an alteration has been made by fraud either on the part of the plaintiff or with the connivance of the plaintiff, no suit can be brought upon an altered document.

(*b*) Where the alteration is the result of an agreement between the parties, the plaintiff's right to sue upon the altered document is not affected.

10 Bombay 487 Foll ;

Civil Second Appeal No. 27 of 1932.

Firm Jugal Kishore Nahar Mal of Nayanagar Versus Ram Gopal and Chowth Mal sons of Daulat Ram *Jats* of Nayanagar.

20th October, 1932.

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2. The Ajmer Courts Regulation 1 of 1877.

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3. The Ajmer-Merwara Municipalities Regulation No. VI of 1925 Section 234.

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Reference in a suit without an order of the court. Effect of :—Decree cannot be passed in terms of the award.

5 J. 57.

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(a) A person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt.

(b) The source of the purchase money is an important criterion, though it is not conclusive when there were other circumstances showing that the purchaser intended the property to belong to the person in whose favour the sale deed was executed. 5 J. 36.

8. Civil Procedure Code.

(*a*) Section 11 Resjudicata.

The distinction between a necessary and a proper party is not material on a question of resjudicata. 5 J. 105.

(*b*) Section 60 (1) (c).

A town residence of an agriculturist debtor is attachable only when he has another house which is used for agricultural purposes. 5 J. 45.

(*c*) Section 102

A rent suit which is not cognisable under Article 8 of the Provincial Small Cause Courts Act by a court of Small Causes for want of notification by the Local Government as required by that Article, is not a suit of the nature cognisable by a court of Small Causes within the meaning of section 102 of the Code of Civil Procedure and a second appeal is not barred in such a suit. 5 J. 78.

(*d*) Section 115.

1. The entertainment of an application made by a person not legally entitled to present it, is a question of jurisdiction.

2. A wrong finding on the question whether a court has or has not jurisdiction is open to revision. But when the question depends on fact, and not on law it is not revisable.

5 J. 88.

3. Section 115. Interlocutory orders Revision of :—

A revision would lie against an interlocutory order if it entails grave hardship or injustice. 5 J. 96.

(e) Section 149 Meaning of: judicial order-definition of :—

Section 149 of the Code of Civil Procedure means that the court must consider whether time ought or ought not to be granted.

An office note to which the judge merely appends his initials is not a judicial Order because the judge does not exercise his discretion at all. 5 J. 82.

(f) Section 151.

The order of dismissal of a suit for default cannot be construed as one rejecting the plaint. The order should be considered as an order under section 151 Civil Procedure Code and the suit could be restored under the same section.

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1. Amendment of pleadings. Rules and principles for grant of leave. 5 J. 1.

2. Order 6 rule 17.

Amendment when to be allowed :—

Whether the court should or should not grant leave to amend the plaint depends upon the stage at which the amendment is asked for and whether the original error in the pleadings is due to mistake or inadvertance. 5 J. 99.

(h) Order 7 rule 7.

In view of Order 7 rule 7 Civil Procedure Code there is nothing to prevent the High Court in Second appeal from granting the proper relief to a plaintiff even though it was

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claimed by him in the lower courts where the facts on which such a relief can be granted are sufficiently stated in the plaint.

5 J. 73.

(*i*) Order 21 rule 103.

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(*j*) *Order 45 rule 7.*

Leave to appeal to the Privy Council: Deposit of security: Power of extension of time. Cancellation of leave: Grounds for. 5 J. 11.

9. (a) Court Fees Act.

Even if possession is claimed in a suit under Rule 103 based upon title the proper court fee payable is Rs. 10/-

5 J. 61.

(*b*) Under section 12 of the Court Fees Act the determination of the class under which the suit falls is not final.

5 J. 61.

10. (*a*) Co-operative Credit Societies Act :—

Section 24.

Section 24 of the Co-operative Credit Societies Act: whether a bar to Liquidator's award against legal representatives of a deceased member. 5 J. 30.

(*b*) Section 29.

Section 29 of the Co-operative Credit Societies Act: Meaning of :—Maintainability of suit for a transaction in contravention of the section. 5 J. 26.

11. (*a*) Criminal Procedure Code. Section 211.

(i) When information to police is followed by a complaint to the court on the same allegations a complaint by the Magistrate is necessary under section 195 (1) Criminal Procedure Code before a Magistrate can take cognizance of an offence under Section 211.

(*c*) Section 22-Suit wrongly filed in name of Firm *Amendment after limitation :*

Suit is not barred as it is only a case of misdescription and not substitution. 5 J. 110.

(*d*) Article 181 of the Limitation Act applies only to applications under the Code of Civil Procedure and not to applications for recovery of Municipal dues.

5 J. 92.

18. Legal representatives.

Suit against legal represetatives standard of proof.

5 J. 7.

19. Mohammadan law.

A marriage of an undivorced woman whose husband is alive is not merely invalid but absolutely void under the Mohammadan law and the children of such marriage are also illegitimate.

A son of an undivorced woman by a second husband is illegitimate and no amount of acknowledgment by his father can possibly make him legitimate. 5 J. 48.

20. The oaths Act.

The oaths Act provides for oaths taken before a Judicial body and not to oaths taken in any other circumstances.

5 J. 57.

21. Property does not always follow possession. The *true rule is that the real owner should not be allowed to suffer.*

5 J. 14.

22. The Railways Act. Section 77.

Section 77 of the Railways Act does not prescribe any notice as to invoke the operation of section 15 (2) of the Limitation Act. It contemplates a submission of claim only.

5 J. 53.

23. Rules of construction.

(*a*) A statute is to be given a meaning which gives effect to the apparent intention of the legislature.

(*b*) The provisions of a statute should be given a meaning which will make them consistent with one another.

5 J. 31.

24. Small Cause Court Revisions.

If there is judicial authority for the view taken by the Small Cause Court, the High Court will not disturb it even *if it* disagreed with it. 5 J. 57,

25. Settlement entries.

Though it has been repeatedly held by the courts that entries in revenue and settlement records are not in themselves proof of title, yet in this District the rule is otherwise because by section 68 of Regulation II of 1877 such entries are to be presumed to be correct until the contrary is proved.

5 J. 21.

26. (*a*) Stamp Act sections 14 and 15.

Section 14 of the Stamp Act prohibits the attempt to use the original stamp for a double purpose as also the actual writing of a second instrument on the same piece of paper. Provisions of section 15 of the Stamp Act apply to such a case. 5 J. 9.

(*b*) Section 35.

Unstamped documents chargeable with a duty of one anna can not be received in evidence on payment of penalty.

5 J. 5.

27. Surety-liability of:—

Stay of execution by Appellate Court on furnishing security-acceptance by lower court of surety bond beyond time allowed the surety is liable even though the executing court has no authority to accept it. 5 J. 69.

28. Transfer of Property Act.

(a) Section 92. A private sale in the course of execution of a mortgage decree is invalid but if the mortgage decree has been paid off by the purchaser he steps into the shoes of the mortgagee. 5 J. 74.

(*b*) Section 107.

A lease not signed by both parties is invalid under section 107 of the Transfer of Property Act.

In a suit for rent, damages for use and occupation should not be granted unless there is an alternative plea or the plaint is amended. 5 J. 100.

(*c*) Redemption suit: Burden of Proof.

In a suit for redemption the plaintiff is bound to show prime facie that he has a title subsisting at the date of the suit. 5 J. 21.

Civil Revision Application No. 12 of 1933.

BEFORE MR. D. R. NORMAN I. C S.

The B. B. C. I. Railway through its Agent at Bombay *Appellant.*

Versus.

The Edward Mills Company Limited Beawar through its Managing Director Rai Sahib Kanwar Moti Lal *Respondent.*

(1) Provisions for appeals and References in Courts Regulation 1 of 1877: whether exhaustive; Their effect of on second appeals.

The Sections dealing with appeals and References in the Courts Regulation I of 1877 are exhaustive as regards the right of appeal. Consequently even when the First Appellate Court does not hear the appeal on merits but dismisses it as time barred its order amounts to confirming the decree of the original Court and no second appeal lies.

(2) Section 149 Civil Procedure Code-Meaning of Judicial order-definition of:—

Section 149 of the Civil Procedure Code means that the court must consider whether time ought or ought not to be granted.

An office note to which the Judge merely appends his initials is not a judicial order because the Judge does not exercise his discretion at all.

(3) Extension of time. Refusal of· Revision Competency·

Even if the lower court's order refusing extension of time is wrong in law no application for revision lies.

(4) Passing orders regarding payment of Court Fees on appeals after limitation on office notes. Undesirability of: Proper procedure what is:

The practice of passing orders on an office note on matters which require a judicial order is undesirable and should be stopped. When the appeal is not properly stamped the court may order the party to make up the deficiency within the period of limitation. But if the appeal is filed on the last day of limitation with deficient court fees the correct course is to call

upon the appellant to show why the appeal should not be rejected and if an application is then made under Section 149 Civil Procedure Code or Section 5 of the Limitation Act notice of it should be given to the opposite party and the point should be decided before the appeal is set down for hearing on its merits.

Date of Judgment 23rd January 1933.

Counsel:—Mr. K S. Mathur for the *Applicant.*

Mr. Daya Shanker for the *Opposite Party.*

Subject matter of the case.

Memo of appeal under Section 100 of the Code of Civil Procedure against the judgment and Decree dated the 31st March 1932, Passed by the Additional District Judge, Ajmer, in Civil Appeal No. 11 of 1931.

Order.—This is a second appeal against the order of the Additional District Judge rejecting appellant's first appeal as time barred. A preliminary objection is taken that no appeal lies. The original suit being filed before the enactment of Regulation IX of 1926 is admittedly governed by Regulation I of 1877. Under that Regulation there is no second appeal when the Court of first appeal confirms the decision of the original Court either on a matter of fact or on a question of law.

2. For appellant Mr. Mathur argues.

(1) That an appeal of this nature is not dealt with by Regulation I of 1877.

(2) That Section 100 of the Civil Procedure Code will therefore apply..

The first ground I think is sound. An order rejecting an appeal as time barred no doubt amounts to a decree and by O. 41 r. 32 the judgment of the appellate Court should confirm, vary or reverse the decree appealed against. The lower appellate Court's order may therefore be held to be one

confirming the decree of the original Court. But it cannot be said to confirm the original Court's decision on a question of fact or law when none of the questions of fact or law in issue in the original Court have been argued at all in the appellate Court:

3. But it does not I think follow that because Regulation I of 1877 neither expressly authorises nor refuses an appeal from such an order as this that section 100 of the Civil Procedure Code applies. Mr. Mathur refers to section 32 of Regulation I of 1877 which runs as follows:—

> "Except as otherwise provided in this Regulation or in any other enactment for the time being in force, the provisions of the Code of Civil Procedure so far as the same may be applicable, shall apply to all suits, appeals and other proceedings in the Civil Courts."

I do not understand that section to mean more than that the Civil Procedure Code will apply in matters on which Regulation I is silent. The sections dealing with the right of appeal in Regulation I come under a heading styled "of appeals and References" and it is natural to suppose that these sections were intended to be exhaustive as regards the right of appeal.

4. I therefore uphold the preliminary objection.

5. Mr. Mathur then asks me to treat the appeal as an application in revision. As he has no other remedy I consider this a reasonable request and grant it subject to his showing that Section 115 Civil Procedure Code applies

6. It is now necessary to summarise the facts briefly. The appeal was presented in the District Judge's Court on the 2nd July 1928. It was correctly valued but there was a deficiency of Rs. 8/- in the stamp appended. This was

pointed out in an office note which concluded "If approved the appellant may be asked to remove the deficiency." This note was initialled by the Judge and the deficit was made up on 13/7/28, i. e. 5 days after the expiry of limitation. When, the appeal came on for hearing the respondent contended that it was time barred. This view was upheld by the learned Judge and he also rejected an application then put in under section 5 of the Limitation Act, section 28 of the Court Fees Act and Section 149 of the Civil Procedure Code.

7. Mr. Mathur's contention is that the Judge had no jurisdiction to set aside his previous order granting time to make up the deficit. The point is by no means clear. Mr. Mathur cites *Jowala Singh* Versus Mst Dhano (1932 Lah. 21). It was there held that a Judge having allowed a deficiency in Court fees to be made up cannot afterwards set aside his own order. But there the original order was only made after the deficiency had been pointed out by the respondent and some arguments had taken place. The ruling has therefore no application here. Respondent cites *Het Ram* Versus *Madho Lal* (Civil S. A. No. 4 of 1929). In that case Shannon, J. C. had permitted a deficiency to be made up after the period of limitation had expired and on objection by the respondent set aside his order and dismissed the appeal as time barred. He relied on a Privy Council decision *Krishnaswami-Panikondar* Versus *S. R. M. A. R. Ramaswami Chettiar* (43 I. C. 493), in which it was held that once an appeal had become time barred the respondent had acquired a valuable right of which they could not be deprived without being heard. The present case, however, is distinguishable because here the original order of the Court was passed on 7/7/28, that is to say before the period of limitation had expired. The respondent therefore had not acquired a valuable right.

8. The question really is whether the order passed on 7/7/28 is to be regarded as a Judicial order or not. If it was not a judicial order the Court was certainly competent to set it aside on objection being taken by the respondent. The Learned Judge, Mr. Shivecharan Das says in his judgment "the order having been made on a mere office note is not sufficient, as no discretion was exercised in the matter at all". But it was not Mr. Shive Charan Das who passed the order on 7/7/28 but his predecessor Sahibzada Abdul Wahid Khan. Still, however, I think that Mr. Shive Charan Dass's view is the correct one. The order could be made either under section 28 of the Court Fees Act or Section 149 of the Civil Procedure Code. Section 28 applies where a document is through mistake or inadvertance filed without being properly stamped. But there was no allegation of mistake or inadvertance so the Court could not act under that section. Section 149 does not prescribe the grounds on which an extention of time can be granted, but says that the Court "may in its discretion" grant time. The meaning of these words in that the Court must consider whether time ought or ought not to be granted. Now the Court could only consider this point when it has before it the reasons for the extention of time are asked. On 7/7/28 there was nothing before the Court except the office note to which the Judge merely appended his initials. I think, therefore, it is clear that the judge did not exercise his discretion at all and that his order was therefore not a judicial order. That being so, his successor Mr. Shive Charan Das had jurisdiction to set it aside on objection being taken.

9. Mr. Mathur has then asked me to consider whether Mr. Shive Charan Das' order is justified on the merits. This in revision application I decline to do. Mr. Shive Charan Das has considered at some length the grounds put forward for failure to pay the proper stamp in time and has held them

to be inadequate. Even if his decision is wrong in law (I do not say it is) that does not constitute a ground for revision.

10. I would add that the practice of passing orders on an office note on matters which require a judicial order is undesirable and should be stopped. If an appeal is not properly stamped the Court may order the party to make up the deficiency within the period of limitation. But if the appeal is filed on the last day of limitation the correct course for the Court is to direct the appellant to show course why his appeal should not be dismissed as time barred. The appellant can then either argue that his appeal was properly stamped and so in time or he can put in an application under Section 149 Civil Procedure Code or Section 5 of the Limitation Act. Notice of this application should then be given to the opposite party and it should be decided before the appeal is set down for hearing on its merits.

11. This revision application is dismissed with costs.

Revision application dismissed.

Civil Revision Application No. 166 of 1932.

BEFORE MR. D. R. NORMAN I. C. S.

Gopi Nath son of Nand Ram Goldsmith of Ajmer since dead represented by Rada Kishen, Sri Kishen and Mohan Lal minor sons of Gopi Nath through their guardian Mst. Gulab alias Kishni widow of Gopi Nath Sunar of Ajmer.

Applicant.

Versus.

Bhanwar Lal son of Sant Lal Ajmer (2) Kalyan Mal son of Ramjiwan Mahajan.......................Auction Purchaser, and (3) Madan Mohan son of Pokhar Lal.......................Judgment-Debtor, ... *Opposite Party.*

(1) Entertainment of an application by a person not legally entitled to present it-whether a question of jurisdiction:—

The entertainment of an application by a person not legally entitled to present it is a question of jurisdiction.

(2) Decision of court that it has or has not jurisdiction-Revision of:—

A wrong finding on the question whether a court has or has not jurisdiction is open to revision, But when the question depends on fact, and not on law it is not revisable.

4 Pat. L. J. 340 Foll.
44 Madras 554 F. B. „
45 All. 425 F. B. Dissented from,

Date of judgment:—30th January 1933.

Counsel:—Mr. Jasodha Nandan for the ... ... *Applicant.*
Mr. Kaushal Das for the ... ... *Opposite Party.*

Subject matter of the case.

Application for revision under Section 115 of the Code of Civil Procedure against the order dated the 4th July 1932, passed by the Additional District Judge, Ajmer.

Order.—The facts material to this application are as follows:—

Applicant held a money decree against Madan Mohan. Madan Mohan held a mortgage from opponent. Applicant got the mortgaged property attached. Opponent 1's objection under O. 21 r. 58 was disallowed and a suit by him to avoid that order was dismissed for default. The attached property was then put up for sal[illegible]

Additional District Judge I think that opponent 1 is a person claiming by a title paramount to the judgment-debtor. In my view opponent 1 is merely attempting to get round the finding against him on his objection under r. 58.

I set aside the order of the Additional District Judge and restore that of the trial Court. Applicant to get his costs from opponent 1 throughout.

Application accepted.

Criminal Reference No. 62 of 1932.

BEFORE MR. D. R. NORMAN I. C. S.

Crown through Municipal Committee Ajmer

Applicant.

Versus.

Amba Lal son of Umrao Singh of Ajmer *Opposite Party.*

(1) Section 234 of the Ajmer Municipalities Regulation:—

Scope of: Magistrate's order under-whether revisable:—

A Magistrate acting under Section 234 of the Ajmer Municipalities Regulation has jurisdiction to decide whether the conditions under which the Municipality can resort to him are fulfilled or not. But he cannot go into the question whether the tax is due or not. He is entitled to go into the question of limitation.

The Magistrate acts as a court and a revision lies.
22 All. 111 Distinguished.

(2) Article 181 of the Limitation Act:—Application of:—

Article 181 of the Limitation Act applies only to applications under the Civil Procedure Code and not to applications for recovery of Municipal dues.

7 Bombay 213
22 Calcutta 929
34 Calcutta 672
60 I. C. 123 Foll·

Date of Judgment: 15 February 1933.

Counsel:— K. B. Abdul Wahid Khan and Mr. Chunni lal Advocates for the ... ... *Applicant.*

Mr. Lekh Ram for the ... ... *Opposite Party.*

Subject matter of the case.

Criminal Reference under Section 438 of the Code of Criminal Procedure by the District Magistrate, Ajmer.

Order.—This is a reference from the District Magistrate under Section 438 Criminal Procedure Code. The material facts are as follows·—

The Ajmer Municipality applied under Section 234 of the Ajmer Municipalities Regulation for the recovery of arrears of vehicle tax due from opponent. The Magistrate held that the Municipality could recover arrears of tax for three years only. The Municipality applied in revision to the District Magistrate on the ground that the trying Magistrate had no jurisdiction to go into the matter judicially and reduce the Municipality's claim. The District Magistrate held that the contention was correct and therefore referred the case for orders.

2. Opponent raises a preliminary objection that no criminal revision application lies as the Magistrate was not acting as an inferior criminal Court.

3. The points for decision are.—

(1) Does a revision application lie under the Criminal Procedure Code ?

(2) Was the Magistrate justified in considering the question of limitation.

(3) Was his order correct ?

My findings are:—

(1) Yes

(2) Yes

(3) No

4. *Point 1.*

If the Magistrate has no discretion at all but is bound on the application of the Municipality to issue an attachment order then he is merely an executive officer of the Municipality and not a Court. But if he can exercise any discretion whether or not to issue an attachment then he acts judicially and is a Court. Further as he is appointed under the Code of Criminal Procedure he is a criminal Court although he is not dealing with crime. Having said so much I will examine shortly the cases cited.

5. In *W. J. Ellis* Versus *the Municipal Board of Mussoorie* (22 All. 111) it was held that a Magistrate recovering dues for the Municipality acted in a ministerial capacity only and the Court refused to interfere with his order. But the Section of Municipalities Act there quoted is not at all on all fours with Section 234 of the Ajmer Regulation; and in particular it does not contain the word "claimable".

6. In *Kanhiya Lal* Versus *Emperor* (4 I. C. 951) the Court had to construe a section of an Act the wording of which is nearly followed in the Ajmer Act. It held that though a Magistrate had no jurisdiction to decide whether a tax was due, the use of the word "claimable" in the section gave the Magistrate jurisdiction to decide whether the tax was one which should be legally imposed. The Court distinguished *W. J. Ellis* Versus *The Municipal Committee* on this

ground. The question whether a reference under the Criminal Procedure Code lies was not specifically raised but the Court set aside the Magistrate's order.

7. In the *Municipality of wai* Versus *Krishnaji Gangadhar* (23 Bombay 446) on an application for the recovery of house tax the Magistrate went into the question whether the assessment was proper. The High Court held that he had no jurisdiction to do this and revised his order.

8. In *S. Rangesa Rao* Versus *A. Swaminatha Ayyar* (1923 Madras 495) it was held that the High Court could revise a Magistrate's order under Section 221 of the Madras Local Board's Act. But as in the judgment the wording of that section and the reasons for the decision are not given this case is of little help here

9. In *Re: Dinbai Jijibhai Khambatta* (43 Bombay 864) it was held that an order by a Magistrate under Section 161 (2) of the Bombay District Municipalities Act could be revised. But the frame of Section 161 differs from Section 234 and the *ratio decidendi* in that case would not apply to a case falling under Section 234 of the Ajmer Act.

10. *Karachi Municipality* Versus *Jafferji Tyabji* (1927 Sind. 23) relied on by opponent obviously has no application to the present case. There is thus no authority except the easily distinguishable case of *W. J. Ellis* Versus *The Municipal Board of Mussoorie*, for the view that the Magistrate's functions are purely ministerial and that no revision application lies.

11. In my view the law is correctly laid down in *Kanhya Lal* Versus *Emperor*. That is to say a Magistrate under Section 234 has jurisdiction to decide whether the conditions under which the Municipality can resort to the Magistrate are fulfilled. That being so he is a Court and a revision lies.

But the use of the word "claimable" shows that the Magistrate cannot go into the question whether the tax is due or not. On that point, as the learned District Magistrate points, out the assessee is given a different remedy by Section 93 of the Regulation.

12. *Point 2.*

In my view the Magistrate had jurisdiction to go into the question of limitation. If the claim of the Municipality to recover a tax is barred by any law I think it obvious that the tax ceases to be claimable.

13. *Point 3.*

The Magistrate has not specified the law under which the claim for arrears of tax for more than 3 years is barred. The only law which could bar this recovery would be art. 181 of the Limitation Act, that is to say the article dealing with applications for which no period of limitation is provided elsewhere. But there is good authority for holding that this article applies only to applications under the Civil Procedure Code (see 7 Bombay 213; 22 Calcutta 929; 34 Calcutta 672; 60 I. C. 123). No authority to the contrary has been cited before me. I accept the view taken in the above rulings and hold that the claim of the Municipality to recover the full arrears of tax was not barred.

14. I set aside the order of the Magistrate and direct him under Section 234 of the Ajmer Municipalities Regulation to recover the full amount of the tax claimed by the Municipality, viz; Rs. 75/-. But in the circumstances I do not think it necessary to make any order as to costs in this Court.

Reference accepted.

Civil Revision Application No. 155 of 1932.

BEFORE MR. D. R. NORMAN I. C. S.

Gokal Chand son of Keshri Mal Mahajan of Mehrun, Kekri Sub-Division .... *Applicant.*

Versus.

The Manager Mehrun Kalan Estate, under the management of the Court of wards on behalf of Thakur Raghubir Singh Istamrardar Village Mehrun Kalan, Kekri, Sub-Division

Opposite Party.

(1) Interlocutory orders-Revision of:—

A revision would lie against an interlocutory order if it entails grave hardship or injustice.

(2) Failure to obtain authority under Section 21 of Regulation 1 of 1888-Effect of —

Failure to obtain an order of the Court of Wards under Section 21 of Regulation 1 of 1888 before filing the suit is a defect which goes to the root of the suit and can not be cured by any subsequent action.

16 Calcutta 89 Foll.

Date of Judgment:—30th January 1933.

Counsel:—Mr. Javand lal Dutt for the ... ... *Applicant.*

Mr. Sri lal for the ... ... *Opposite Party.*

Subject matter of the case.

Application for revision against the order dated the 14th September 1932, passed by the Sub Judge, First class, Kekri in Civil Suit No. 23 of 1930.

Order.—Opponent as Manager of an estate under the Court of wards filed on 20-3-30 a suit against applicant. On 6/4/32 applicant objected that the suit was incompetent as an order of Court of Wards required by Section 21 of Regulation I of 1888 had not been obtained. In August 1932 opponent filed on order from the Commissioner authorising the filing of the suit. Applicant objected that the order could not have retrospective effect. The Court considered that failure to produce the order before instituting the suit was a technical irregularity which had been cured. It therefore directed the suit to proceed. Against this order applicant has come in revision.

2. The first question is whether this Court has power to interfere with an inter-locutory order. On this point there is diver-gence of opinion between the various High Courts. The High Courts of Allahabad and Lahore hold that there is no revision against an inter-locutory order; the remaining High Courts hold that there is. In this Court too there is a diver-gence of opinion. In Kalu Khan Versus Fakir Khan (Civil R. No. 57 of 1926) Barlee J. C. followed the Allahabad view. In *Khadims of Durgah Khawja-Sahib* Versus *Dewan Syed Aley Rasul Khan* (Civil Revision No. 51 of 1928), Broomfield J C. held that an interlocutory order could be revised if it entailed grave handship and dissented from Barlee J.C's opinion. I do not purpose to discuss at length all the rulings on the point. I agree with Broomfield J. C. that this Court is not bound to follow Allahabad in every case, and as this is the latest ruling of this Court and is in accordance with the view of the majority of the High Courts, I propose to follow it. I should however make it clear that it is not every interlocutory order that can be revised. Revision will only be allowed in the circumstances referred to in Broomfield J. C's judgment namely to say to avoid grave hardship or injustice.

3. Coming to the present case I think it will cause grave hardship to applicant if he is compelled to fight out a case which must fail because the Court has no jurisdiction. I am therefore prepared to consider the point of jurisdiction.

4. Section 21 of Regulation I of 1888 runs as follows:—

"No suit shall be brought on behalf of any Government ward unless it is authorised by some order of the Court of Wards..................." Only one authority exactly in point is quoted, namely *Dinesh Chunder Roy* Versus *Dinesh Chunder Roy Chowdhry* (16 Calcutta 89). In that case a suit by manager was instituted with-out an order of the Court of Wards. An order was put in when the case went on appeal. It was held that the order could not have retrospective effect. The wording of the corresponding Section in the Bengal Court of Wards Act is subtantially the same as in Regulation I. This case therefore can only be distinguished on the ground that the order was not put in until after the decree in the trial Court. But the judgment of the Court did not really proceed upon that distinction, and the case is certainly an authority in favour of the applicant.

5. An analogous section to section 21 is section 92 of the Civil Procedure Code which authorises the filing of a suit after plaintiffs have obtained the consent of Advocate General. It has been held that failure to obtain sanction cannot be rectified after the institution of the suit (see *Tricumdass* Versus *Khimji* 16 Bom. 626, also *Gopal Dei* Versus *Kanno Dei* 26 Allahabad 162).

6. On the other side it is argued that applicant by allowing the suit to continne for two years before bringing his objection must be deemed to have waived it. It was held in *Puran Chandra Sarkar* Versus *Radharani Dassya* (1931 Calcutta 175) that want of notice under Section 80 could be cured if objection was not taken at once. But Section 92 bears much closer analogy to Section 21 than does Section 80.

7. Proviso (a) to section 21 runs as follows:—

"A manager may authorise a plaint to be filed in order to prevent a suit from being barred by the law of limitation, but the suit shall not afterwards be proceeded with except under the sanction of the Court of Wards". When the law permits the order of the Court to be obtained subsequently in special circumstances it is a resonable inference that it cannot be subsequently obtained in any other circumstances. *Expressio unius est exclusio alterius.*

8. For the above reasons I hold that failure to obtain an order of the Court of Wards before filing the suit is a defect which goes to the root of the suit and which cannot be cured by any subsequent action. It follows that the present suit is bad in law.

9. I allow the application and dismiss opponent's suit. But as the objection was brought by the defendant after the suit had proceeded for two years I make no order as to costs in the lower Court. Applicant must get costs of this application.

Application allowed.

Small Cause Court Revision Application No. 133 of 1932..

BEFORE MR. D. R. NORMAN, I C. S.

Mr. G. Gould Porter and (2) Mr. A. Pooler of Srinagar Road, Ajmer .... *Applicant.*

Versus.

Pandit Jatan Lal son of Pandit Chitar Mal Brahmin of Ajmer .... *Opposite Party.*

(1) Lease not signed by both parties validity of:—

A lease not signed by both the parties is invalid under section 107 of the Transfer of Property Act.

(2) Suit for rent-Whether damages for use and occupation can be awarded.

In a suit for rent, damages for use and occupation should not be granted unless there is an alternative plea or the plaint is amended.

21 W. R. 208
22 Calcutta 752
1928 Nag. 27 (A. I. R.) Foll.
31 Allahabad 276 Distinguished.

(3) Amendment-when to be allowed.—

Whether the court should or should not grant leave to amend the plaint depends upon the stage at which the amendment is asked for and whether the original error in the pleadings is due to mistake or inadvertence.

Date of Judgment.—30th January 1933.

Counsel.—Mr. B. D. Khanna for the ... ...*Applicant.*
Mr. Daya Shanker for the ... ... *Opposite Party.*

Subject matter of the case.

Application for revision under Section 25 of the Provincial Smaall Cause Courts Act IX of 1887 against the order dated the 18th May 1932, passed by the Judge, Small Cause Court, Ajmer, in suit No 1117 of 1932.

Order.—Applicants executed a lease of a shop for two years from 15 1-31 in favour of opponent, and entered into possession. The lease is admittedly invalid as it is not executed by both parties as required by Section 107 of the transfer of Property Act. Later applicants, wishing to terminate the contract, gave notice to opponent that they proposed to vacate the shop on 31-8-31. Opponent refused to accept the notice and correspondence followed in which

applicants' pointed out to opponent that the two year's lease was bad in law. It is not really disputed that applicants did vacate the shop on 31-8-31. Further the balance of rent due up to that date (Rs. 27/8/-) was offered by applicants and refused by opponent.

On 14-3-32 opponent sued applicants for the balance of rent due up to that date. The plaint was disingenuous. It did not refer to the invalid lease. It did not aver that applicant had contracted to pay rent for any particular period or that they had occupied the shop for any particular period. It thus did not disclose any cause of action and should have been returned.

At the hearing opponent produced the lease. The Court held rightly that it was invalid under the Transfer of Property Act but that it was admissible to prove the nature of applicants' possession. In the event he awarded opponent the amount claimed as damages for use and occupation.

Obviously this decision cannot stand if only on the ground that no evidence of use and occupation was tendered. But it is also attacked on the ground that in a suit for rent damages for use and occupation cannot be awarded.

The following rulings are relied on:—
Lukhee Kant Doss Chowdhry Versus *Sumeerooddi Tuslar* (21 W. R. 208) *Surendra Narain Singh* Versus *Bhai Lal Thakur* (22 Cal. 752) *Tribeni Prasad* Versus *Ram Das* (1928 Nag. 27).

The ratio decidendi in these cases is that the evidence which has to be led in a suit for damages for use and occupation is quite different from that required in a rent suit.

There is one ruling to the contrary namely *Sheo Karan Singh* Versus *Maharaja Parbhu Narain Singh* (31 All. 276). But in that case the use and occupation were not denied.

In my view a suit for rent differs essentially from a suit for damages for use and occupation and I agree with the majority of the cases cited that in a rent suit damages should not be granted unless there is an alternative plea or the plaint is amended. Whether the Court should or should not grant leave to amend the plaint depends upon the stage at which the amendment is asked for and whether the original error in the pleadings is due to mistake or inadvertence. Here no amendment has been asked for, and, since the plaintiff was well aware of the invalidity of the lease before filing the suit this is not a case in which amendment ought to be allowed.

I accept the application, set aside the decree of the Lower Court and dismiss plaintiff's suit with costs throughout.

Application accepted.

Small Cause Court Revision Application No. 209 of 1932.

BEFORE MR. D. R. NORMAN I. C. S.

Pahara son of Kalu, caste Chita of Chowrsiawas. *Applicant.*

Versus.

Ram Bilas son of Sheo Nath and Anat Mal son of Pahlad, Mahajans of Ajmer. .... *Opposite Party.*

Facts:—A plaint was filed on deficient court fee and on time bein granted to make it up plaintiff failed to appear and the suit was dismissed for default. It was then restored exparte under Order 9 rule 4 Proce Code and eventually the deficiency was made good and t was and decreed.

In revision it was contended that the dismissal of the suit for default amounted in law to the rejection of the plaint under Order 7 rule 11 (c) of the Civil Procedure Code of which there could be no restoration and all subsequent proceedings were void.

Held.—That the order of dismissal for default cannot be construed as one rejecting the plaint. In the present case the order should be considered as an order under section 151 Civil Procedure Code and that the suit could be restored under the same Section.

1926 A. M. L. J. Supp. 41 Distinguished.

Date of Judgment:—20th February 1933.

Counsel.—Mirza Abdul Qadir Beg for the ... ... *Applicant.*

Mr. Kaushal Das for the ... ... *Opposite Party.*

Subject matter of the case.

Application for revision under Section 25 of tbe Provincial Small Cause Court Act IX of 1887 against the order dated the 15th November 1932, passed by the Judge Small Cause Court, Ajmer in suit No. 725 of 1931.

Order.—Opponent filed a suit on a one rupee stamp and asked for time to make up the dificiency. This was granted and the time extended from time to time. Eventually opponent failed to appear and the Court passed the following order:—

"Plaintiff absent suit dismissed for default."

Opponent assuming this to be an order under O. 9. r. 3 applied for restoration under O. 9 r. 4. Restoration was granted *exparte* and further time was allowed to pay the balance of the Court fees. Eventually it was paid and the suit was heard and decided in favour of opponent.

2. The grounds of this application are:—

(1) As the full Court fees had not been paid and therefore no summons issued, the suit could not be dismissed under O. 9 r. 2 or 3 and the only order which the Court could make was one under O. 7 r. 11 (c) rejecting the plaint.

(2) The Court must be presumed to have done that which alone it could have done, and therefore the restoration under O. 9. r. 4 was without jurisdiction and it and all subsequent proceedings are void.

3. Now in the first place I find it difficult to hold that an order which on its face is one dismissing a suit for default of appearance can be construed as one rejecting the plaint for failure to pay Court fees. Mr Abdul Qadir Beg refers me to *Seth Sobhag Mal Lodha* Versus *Kistur Chand* (Civil Appeal No. 5 of 1926, A. M. L. J. 1926 Supplement, 41) in which it was held th-t a Court must be taken to have done that which it could alone do under the provisions of law. In that case the question was whether an order of remand which purported to be under O. 41 r. 23 should be *considered to be under Section 151*. But an order of remand under O. 41 r. 23 and an order of remand under Section 151 are *ejusdem generis*, while an order dismissing a suit for default of appearance and an order rejecting a plaint are entirely different things.

4. In the second place, Mr. Kaushal Das for opponent while conceding that an order under O. 9 rr. 2 or 3 could not be passed has argued that an order of dismissal for default of appearance could be passed under Section 151 and that such an order could also be set aside under Section 151 and that this should be deemed to have been done. No precedent has been quoted. But if a party has by some accident been prevented from appearing to make up a deficit Court fee, it would be rather hard that he should lose his right of suit altogether without any remedy, unless there is still time for him to file another suit. O. 9 r. 2 not applying, I do not think a Court would be wrong in ordering a dismissal for default under Section 151 rather than rejecting the plaint absolutely.

5. In this case therefore I am prepared to accept Mr. Kaushal Das's argument that the order of dismissal should be considered as an order under Section 151 and further that

the Court could under Section 151 restore the suit. It follows from this that subsequent proceedings were not void. I would add however that where a party fails to appear to pay deficit Court fee the Court is certainly not bound to act under Section 151 and has full discretion to reject the plaint. This decision should not be construed as a precedent for excusing the default of parties.

6. I reject the application, but looking to all circumstances I make no order for costs.

Application dismissed.

Civil Revision Application No. 35 of 1933.

BEFORE MR. D. R. NORMAN I. C. S.

Asa Ram son of Bhur Singh Rajput of Ajmer. *Appellant.*

Versus.

(1) Abdul Rahman son of Chand Khan of Ajmer.
(2) Mohamed Ibrahim Khan } Sons of Abdul Rahman
(3) Mohamed Ishaq Khan } Khan of Ajmer.
(4) Gulzari Lal son of Hulasi Ram of Ajmer and
(5) Salig Ram son of Gulzari Lal of of Ajmer

Respondents.

(1) Competency of appeal on a point which will not be res judicata

An appeal is not admissible on a point which would not operate as resjudicata.

(2) Distinction between necessary and proper party whether material on question of res judicata.

The distinction between a necessary and a proper party is not material on a question of resjudicata.

53 Allahabad 103 P. C. Foll:

12 Calcutta 580 F. B. & 27 Allahabad 59 Not Followed

(3) Subsequent events-Effect of on right of appeal.

A right of appeal must be decided on the facts as they were at the date of the filing of the appeal.

Date of Judgment.—7/3/1933.

Counsel:—Mr Ghisu Lal for the .. .. *Applicant.*
Mr. Abdul Qader Beg and Mr. Hem Chandra Sogani for the *Opposite Parties.*

Subject matter of the case.

Memo of appeal against the Judgment and Decree dated the 11th October 1932 passed by the Additional District Judge, Ajmer in Civil Appeal No. 104 of 1929.

Order.—The facts material to this revision application are as follows:—

The suit property was purchased by Asa Ram defendant No. 4 and another from Qader Bux. Subsequently Asa Ram acquired the whole interest in the property and sold it to plaintiff Gulzari Lal. Gulzari Lal got possession but was obstructed by defendants 1-3 who claimed a title to the land under a sale deed from Qader Bux prior in date to Asa Ram's sale deed. Gulzari Lal sued for a declaration and an injunction.

Issue No. 3 ran:—

"3. Did defendant 4 purchase the property in dispute subsequent to the purchase of the same by defendants 1-3?".

The trial Court found in favour of defendants Nos. 1-3 and dismissed the suit. It also ordered Asa Ram to pay plaintiff's costs.

2. Against this decision Asa Ram appealed. On receipt of notice of this appeal Gulzari Lal made an application to be made a co-appellant instead of a respondent. When the appeal came on for hearing defendants 1-3 objected that no

the Court could under Section 151 restore the suit. It follows from this that subsequent proceedings were not void. I would add however that where a party fails to appear to pay deficit Court fee the Court is certainly not bound to act under Section 151 and has full discretion to reject the plaint. This decision should not be construed as a precedent for excusing the default of parties.

6. I reject the application, but looking to all circumstances I make no order for costs.

Application dismissed.

Civil Revision Application No. 35 of 1933.

BEFORE MR. D. R. NORMAN I. C. S.

Asa Ram son of Bhur Singh Rajput of Ajmer. *Appellant.*

Versus.

(1) Abdul Rahman son of Chand Khan of Ajmer.
(2) Mohamed Ibrahim Khan } Sons of Abdul Rahman
(3) Mohamed Ishaq Khan } Khan of Ajmer.
(4) Gulzari Lal son of Hulasi Ram of Ajmer and
(5) Salig Ram son of Gulzari Lal of of Ajmer

Respondents.

(1) Competency of appeal on a point which will not be res judicata.

An appeal is not admissible on a point which would not operate as resjudicata.

(2) Distinction between necessary and proper party whether material on question of res judicata.

The distinction between a necessary and a proper party is not material on a question of resjudicata.

The Additional *District Judge's* attention however was not invited to a very recent ruling of the Privy Council in *Munni Bibi Versus Tirloki Nath* (53 All. 103). *In* that case there was a house which was claimed by both A and B. C *who held a money decree* against A sued both A and B for a declaration that the house was liable to attachment under *his decree.* It was held that the title was with A and that the house could be attached. In subsequent litigation between the representatives of A and B their Lordships held that this decision operated as *res-judicata* in favour of A. Their Lordships further remarked.

"It is true that the appellant did not enter an appearance *in the suit, and it is also* said that she was not a necessary party to it but their Lordships do not regard either of these factors as really material. The appellant was at all *events* a proper party to the suit and had the right to be heard if she so desired."

It is clear from these remarks that the distinction between a necessary party and a proper party drawn by the Additional District Judge is not material on a question of *res-judicata.* Their Lordships do not in their judgment refer either to *Brojo Behari Mitter* Versus *Kedar Nath Mozumdar* or to *Malhi Kunwar* Versus *Imamuddin* but in my view their decision by implications overrules those cases.

5. It is argued that the Privy Council case is distinguishable from the present one because there both A and B claimed an interest in the house at the time of the previous suit whereas whatever interest Asa Ram had he had admittedly sold to Gulzari Lal. But although Asa Ram had no actual interest in the property he had an interest in the protection of his original title to the property. For if Gulzari Lal failed to retain possession through a defect in Asa Ram's title he could, under the implied covenant for title, recover his purchase money from Asa Ram. I therefore think that Asa Ram ' ·
a person having an interest in the decision of the su

6. It is then argued that subsequent to the filing of the appeal but prior to the hearing Gulzari Lal sued Asa Ram for a refund of the purchase money and failed. I have called for the judgment and find that the suit was dismissed not on the merits but as time-barred. Moreover Asa Ram states that he agreed to make a payment to Gulzari Lal in consideration of his not filing an appeal, and I have been shown the document to this effect Apart from that a right of appeal must be decided on the facts as they were at the date of the filing of the appeal.

7. I do not think it necessary to set out the other rulings relied on by opponents. In them either no facts are given or the facts are substantially different

8. For the reasons given above I hold that Asa Ram was competant to appeal

9. I allow Civil Revision No. 35 of 1933, set aside the order of the lower appellate Court and remand Asa Ram's appeal for disposal on its merits. Applicant to get the costs of this application from opponents 1-3. In view of this decision it is not necessary to pass any orders in Gulzari Lal's application. It should be considered by the Additional District Judge, when disposing of the appeal.

Application allowed.

Small Cause Court Revision Application No. 15 of 1933.

BEFORE MR. D. R. NORMAN I. C. S.

B. P. Bhargava son of Mr. Prabhu Dayal, proprietor of the firm Beni Prasad and Sons through his Mukhtiyar Ghisu Lal of Ajmer .... *Applicant.*

Versus.

Ghisu Lal son of not known, Carpenter, now residing in Kishengarh ... . *Opposite Party.*

(1) Suit wrongly filed in name of Firm: Amendment after limitation-whether bars suit

Where a man gives his business a name which suggests several partners it does not turn that business into a firm. The name is merely an alias for the proprietor of the business. If in such a case a suit is filed under that alias and is subsequently amended after limitation by substituting the plaintiff's proper name the case is one of misdescription and not substitution of parties and the suit does not become time barred.

35 C. W. N. 432
30 B. L. R. 117 Distinguished.

Date of Judgment:—28th February 1933.

Conusel.—Mr. Gajendra Nath for the ... ... *Applicant.*
Mr. Jyoti Swaroop for the ... ... *Opposite Party.*

Subject matter of the case.

Application for revision under Section 25 of the Provincial Small Cause Court Act IX of 1887 against the judgment dated the 25th October 1932, passed by the Judge Small Cause Court, Ajmer in suit No. 3419 of 1931.

Order.—The facts material to this application are as follows:—

A suit was filed by the firm Beni Prasad and Sons through its manager and Mukhtar Ghisu Lal. On objection by the defendant the heading was amended to read "Beni Prasad son of Prabhu Dayal proprietor of the firm Beni Prasad and Sons through its Manager and Mukhtar Ghisu Lal of Ajmer." The suit was dismissed as time barred on the ground that it must he held to have been filed at the date of the amended plaint. It is argued that this decision is wrong. T

6. It is then argued that subsequent to the filing of the appeal but prior to the hearing Gulzari Lal sued Asa Ram for a refund of the purchase money and failed. I have called for the judgment and find that the suit was dismissed not on the merits but as time-barred. Moreover Asa Ram states that he agreed to make a payment to Gulzari Lal in consideration of his not filing an appeal, and I have been shown the document to this effect Apart from that a right of appeal must be decided on the facts as they were at the date of the filing of the appeal.

7. I do not think it necessary to set out the other rulings relied on by opponents. In them either no facts are given or the facts are substantially different.

8. For the reasons given above I hold that Asa Ram was competant to appeal

9. I allow Civil Revision No. 35 of 1933, set aside the order of the lower appellate Court and remand Asa Ram's appeal for disposal on its merits. Applicant to get the costs of this application from opponents 1-3. In view of this decision it is not necessary to pass any orders in Gulzari Lal's application. It should be considered by the Additional District Judge, when disposing of the appeal.

Application allowed.

Small Cause Court Revision Application No. 15 of 1933.

BEFORE MR. D. R. NORMAN I. C. S.

B. P. Bhargava Son of Mr. Prabhu Dayal, proprietor of the firm Beni Prasad and Sons through his Mukhtiyar Ghisu Lal of Ajmer .... *Applicant.*

Court relied on *Neogi Ghose & Co.* Versus *Sardar Nehal Singh* (35 C W. N. 432). In that case the facts were similar. The learned Judge however does not give his own reasons for his decision but refers to a pervious case *Vynakatesh Oil Mill* Versus *N. V. Velmahomed* (30 B. L. R. 117). In that case a suit was filed in the name of the firm by one of its partners. As however the firm did not carry on business in British India O. 30 r. 1 did not apply and no suit in the name of the firm lay. On an application to substitute the names of all the partners it was held that the plaint must be deemed to be filed from the date of that substitution. The Judge remarked that the suit could not be regarded as one filed by the individual partner who signed and affirmed the plaint because in that case it would be bad under Section 45 of the Contract Act under which all joint promisees must be joined in a suit to enforce a debt due to them. For this reason that case is distinguishable from the present case which is one of mis-discreption only. It is not really a case of a suit by á firm, for the reason that a firm is a business belonging to two or more partners. The fact that a man gives his business a name which suggests several partners does not turn that business into a firm. The name is merely an *alias* for the proprietor of the firm. If he sues under that *alias* instead of under his proper name, no doubt the plaint ought to be corrected; but as the business name and the real name both refer to the same person the case falls under mis-discription and not under substitution. As was pointed out in the Bombay case the Court of Appeal in England in *Mason and son* Versus *Mogridge* (8 T. L. R. 805) took a different view. But the law of pleading is construed more strictly in England than in India.

It appears however from the judgment of the trial Court that even if the date of the original filing of the suit be taken the claim will be time barred as regards one of the two principal items. The date of the first item is given neither

in the plaint nor in the memo of accounts attached to it. On this point Mr. Gajendra Nath for the applicant urges that the trial Court wrongly disallowed an applicaiton to amend the plaint. The plaint as originally drafted stated that the cause of action for the whole amount accrued on the date of the last item. When the plaint was returned for amending the heading applicant also amended the body, and gave three dates on which the goods were said to have been purchased. The defendant naturally objected and the Court quite correctly ordered these amendments to be struck off on the ground that the plaint had been returned for the amendment of the heading only. Applicant put in no further application for amendment and argued the case on the footing that time for the whole amount ran from the date of the last item. The Court held that it did not, and it is not suggested that this decision is incorrect.

Mr. Gajendra Nath now suggests that he should be allowed to make the necessary amendment in the body of the plaint to show the date of each item I see no reason to grant this request. It is for the plaintiff to show now how his plaint is in time. If he endeavours to show that it is in time on one ground and fails on that, it is not then open to him to allege new facts which would make his plaint in time on another ground.

The result is that I find the suit to be in time as regards the item of Rs. 4/9/- and such portion of the interest as appertains to that item. The case having been disposed of on a preliminary point must go back for trial. As applicant has succeeded on the main ground of this application he must get his costs in this Court.

Application accepted.

Short Notes of Important Judgments.

1. (a) Section 11 of the Civil Procedure Code.

Section 11 of the Civil Procedure Code is not exhaustive on the subject of resjudicata. Where the previous proceedings were a nullity they could not be resjudicata.

(b) **Section 92 of the Evidence Act**—Character of a Party Oral evidence.

The charactor in which a party signs a contract is not a term of the contract and section 92 of the Evidence Act is no bar to extraneous evidence being led that a person signing a contract signed on behalf of others as well as himself.

Civil Second appeal No. 38 of 1932.

Dated 30th January 1933.

Firm Otar Mal Chatar Bhuj of Beawar. Versus Firm Surat Ram Poonam Chand of Beawar.

2. Acknowledgment after suit.—Whether saves limitation—Section 20 of Limitation Act·

An acknowledgment need not be contemporaneous with the payment, but if made after the suit has begun it cannot save limitation.

Under Section 20 of the Limitation Act it is necessary for the plaintiff to aver not only that payment was made but also that *it was acknowledged in writing.*

35 I. C. 199 and Halsbury's Laws of England

Volume 19 Para 95 Foll.

Small Cause Court Revision Application No. 142 of 1933

Dated 3rd February 1933.

Sanwal Ram and Gog Raj of Nasirabad. Versus Gande Lal and Rahim Bux of Nasirabad.

3. (a) Undue Influence-Ingredients of:—Burden of Proof.

The elements of undue influence are that one person should be in the position to dominate the will of another and that he should have used that position to obtain an unfair advantage.

Where a person who is in a position to dominate the will of another enters into a contract with him and the contract appears to be unconscionable the burden lies on the former to show that the contract was not induced by undue influence.

(b) **Inartistic pleadings**—relief to be granted.

If there are facts on the record to justify the inference of undue influence, the court has power to administer relief notwithstanding inartistic pleadings. All that the court has to see is that the adversary is not taken by surprise.

77 I. C. 639 P. C. Distinguished.

1931 Nag. 63 at 64 Foll.

Civil Revision application No. 151 of 1932.

Dated 6th February 1933.

Jawahar Mal Dosi of Ajmer. Versus Mst. Nathi of Ajmer.

4. Amendment of plaint—When to be allowed:—

A plaint laid as one for recovery of money lent cannot be allowed to be amended to show that the money was not a loan but was earnest money paid on a contract of sale which the other side had failed to perform.

Small Cause Court Revision Application No. 213 of 1932.

Dated 15th February 1933

Peeru of Ajmer. Versus Sri Govind of Ajmer.

5. (a) Cesses: Colonel Dixon's Robkar dated the 13th December 1854. Effect of-to whom applies.

Colonel Dixon's Robkar dated the 13th December 1854 is merely an executive order and has not the force of statute law. It merely forbids collection of cesses-ginti, kholri etc by Bhumias and Patels for their own benefit. It does not apply to village bodies.

(b) **Judgment in Civil Second Appeal No. 56 of 1928. Meaning of:—**

The Judicial Commissioner's judgment in Civil Second appeal No. 56 of 1928 Shamlat Committee Thok Maliyan of Ajmer Versus The Malies of Ajmer-determines nothing more than that Gaoshumari which is equivalent to ginti, and kholri could not be levied without proof of consideration i. e. it must be proved that the party sought to be made liable had actually grazed his cattle on and used forest produce from Shamlat land.

Civil Second Appeal No 5 of 1933.

Dated 20th February 1933.

Chander son of Ganesh Khatik of Ararka. Versus Dhool Singh and others of Ararka.

6. (a) Execution application in suits filed before 1st January 1927-whether governed by old Courts Regulation— Competency of Second appeal:—

An execution application filed after the 1st of January 1927 though arising out of a suit filed before that date is not governed by the Courts Regulation I of 1877 and even when the first Appellate Court confirms the trial court's order a second appeal is competent.

(b) **Filing of copy of decree in execution appeals: Necessity of—**

An order in an execution application is in itself a decree within the meaning of section 2 (2) of the Civil Procedure

3. (a) Undue Influence-Ingredients of:—Burden of Proof.

The elements of undue influence are that one person should be in the position to dominate the will of another and that he should have used that position to obtain an unfair advantage.

Where a person who is in a position to dominate the will of another enters into a contract with him and the contract appears to be unconscionable the burden lies on the former to show that the contract was not induced by undue influence.

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If there are facts on the record to justify the inference of undue influence, the court has power to administer relief notwithstanding inartistic pleadings. All that the court has to see is that the adversary is not taken by surprise.

77 I. C. 639 P. C. Distinguished.

1931 Nag. 63 at 64 Foll.

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A plaint laid as one for recovery of money lent cannot be allowed to be amended to show that the money was not a loan but was earnest money paid on a contract of sale which the other side had failed to perform.

Small Cause Court Revision Application No. 213 of 1932.

Dated 15th February 1933

Peeru of Ajmer. Versus Sri Govind of Ajmer.

damages awarded are sufficient or not. No second appeal lies on these points.

Civil Second appeal No. 8 of 1933.

Dated 28th February 1933.

Babu Debi Din Tamboli of Ajmer. Versus Anant Mal Mahajan of Ajmer.

10. Section 53 A of Transfer of Property Act—whether retrospective:

Retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. Section 53 A of the Transfer of Property Act is not therefore restrospective.

Civil Second appeal No. 49 of 1932.

Dated 7th March 1933.

Firm Jeth Mal Kundan Mal of Bijainagar. Versus Seth Badri Lal and others of Ajmer.

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*(*Indicates that the case contains only the short notes. I or II means Part I or Part II respectively.*

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(*N. B.* Some cases have been shown under two heads for facility of reference, e g; A. Poolar both under 'A' and 'P'; "Mst. Chaibri" both under 'M' and 'C'. Where an appellant's name is prefixed with Mr., Dr, Firm etc., it has been classified under the proper name and not the prefix.)

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Subject Index of cases Reported.

(**indicates that the judgment is not printed in full but only the* Law Point *arising in it is published.* I *or* II, *against the page, indicates that the short note is to be found in Part* I *or Part* II. *as the case may be.)*

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*G. CORNELIUS vs REV. LAKSHMI CHAND. **6—II**

—S. 100—*Finding of fact—interference—no evidence—evidence disbelieved for no reason*—when there is no evidence at all for the fact held to be proved or where evidence is disbelieved for no reason at all, High Court will interfere in second Appeal.

PIROO LAL vs. JATAN LAL. **1**

—S. 100—*Finding of fact—no interference*—A finding of fact cannot be upset merely on the ground that it is *against the weight of evidence* nor on the fact that the judge has not in his judgment referred to all the evidence on the record.

PIROO LAL vs. JATAN LAL. **1**

—S. 109 (c)—*Certificate*—When a suit cannot be valued in money, a certificate of leave to appeal to Privy council can be granted only under S. 109 (c).

*GANGA DHAR vs. BENI GOPAL. **4—I**

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—S 114 & O. 47, R 1 —*Point not raised at hearing*—The general rule is that a Court will not allow a review on a point not raised at the hearing of the case.

B. B. & C. I. RY. CO vs. EDWARD MILLS CO. LTD. BEAWAR. 53

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—S 115—*No reasons given*—when no reasons are given by the lower Court for its decisions it is open to the High Court to go into the Point.

MD HASMAT ULLAH. vs. BASTI BIBI. 27

—S. 115 —*Point not raised in appeal but raised in review--Lower Court rejected it on wrong view of law.—it can be raised in Revision*—Where appellant wants to be allowed to argue his appeal to the extent of Court fee paid within limitation, this ought to be put forward by him as an alternative plea when the appeal is argued. But when this plea was urged in review application which was rejected on a wrong view of law and not on the ground that it was not urged in appeal, it is open to the High Court to allow it to be raised in revision.

MD. HASMAT ULLAH vs. BASTI BIBI. 27

—S. 149—*Appeal insufficiently stamped-it ought to be heard up to the value of the Court Fee paid.*—An appellant whose prayer for time to make up deficient Court fee has been rejected ought to be heard up to the value of the Court fee paid in time.

MD. HASMAT ULLAH vs. BASTI BIBI. 27

—*Several reliefs but not separately valued—Appellate Court will not hear Suo motu*—Where the reliefs are several and are not separately valued it is not possible for a Court of Appeal to hear the appeal up to the value of the Court fee paid within limitation, suo motu without an application to amend the memorandum of appeal

MD. HASMAT ULLAH vs. BASTI BIBI. 27

—S. 151 and O. 41, R. 19—When the Civil Procedure Code prescribes a particular procedure for setting aside a dismissal for default that procedure is exhaustive and section 151 cannot be used.

* MATHRA DAS. vs. KALYAN MAL. 7—II

Civil Procedure Code (1908)—*Contd.*

—O. 6, R. 17—*Amendment not allowed to waive default clause*—When a plaintiff has once relied on the default clause he cannot afterwards be allowed to amend his plaint so as to waive it.

ABDUL GHANI. vs. AKBER KHAN. 41

—O. 7, R. 7—*Minor relief can be granted where major relief claimed.*—Where a major relief is claimed a minor relief can, if proved, be granted. A plaintiff suing on sole ownership can succeed on proof of joint ownership.

* BENI GOPAL vs. KANHIYA LAL (SETH). 4—I

—O. 16—*Witness residing out of British India-Non-attendance*—The provisions of O. 16 are not confined to witnesses residing in British India. A Court cannot refuse to issue summons to witnesses residing outside British India. A Court cannot compel the attendance of such witnesses and if such witnesses do not appear and the party requiring them does not ask for a commission, a court will be justified in proceeding without them.

* MAGAN LAL (MR.) VS. JOHRI LAL (SETH). 2—I

—O. 17,R. 1—*Counsel's engagement in an other Court*—As Counsel frequently have to appear in more courts then one on the same day, a request for postponement of a case on this ground should ordinarily be granted when this will not entail inconvenience to the other side or dislocate the Judge's work.

* RAMA NAND. vs. JAI KISHAN. 7—II

—O. 20, R. 11—*Instalments—interest*—Instalments should not be awarded unless some evidence is led of the defendants' condition. When instalments are allowed it is equitable to allow future interest.

* KANHIYA LAL. vs. HUNJA. 1—I

—O. 21, R. 63—*Suit under—Possession claimed—court fee Rs. 10/-* When possession is claimed in a suit under O. 21, R. 103, C. P. C. which is based upon title the proper court fee payable is Rs. 10/-

CHAIBRI BAI vs. NOOR MOHAMMED. 46

—O. 21, R 66—*Sale proclamation.*—The sale proclamation shall specify as fairly and accurately as possible the amount for the recovery of which the sale is ordered, which should include all sums for future interest and costs incurred and due up to that date. Any such sum not included in the sale proclamation

Civil Procedure Code (1908)—*Contd.*

cannot be claimed thereafter in that Darkhast except costs incurred and allowed subsequent to the sale proclamation.

* POOSAMAL vs. HANGAMKOER. **5—II**

—O. 41, R. 19 & S. 151—When an appeal is dismissed for default the proper remedy for its restoration is an application under O 41, R. 19 and not Section 151. But when the appellant had no notice of the hearing he can have resort to Section 151, because O. 41, R. 19 read with article 108 of the Limitation Acts pre-supposes the proper service of summons on the appellant.

* MATHRADAS vs. KALYANMAL. **7—II**

—O. 47, R. 1—*See S. 114.*

Contract Act.

—S. 70—*Applies to Doctor's fees.*—It is not usual for a doctor to stipulate for his fees. He would be entitled to a reasonable fees for his services unless they were intended to be gratuitous.

*ROY (DR. J. M.) vs. GHOSH (MR N. K.) **4—I**

—S. 74—*Interest from date of bond, on default, is penal*—In so far as interest is to run from date of bond and not from the date of default it is penal. There is no law which forbids allowing such interest. Unless relief can be granted under some statute such as the usurious Loans Act or Sec. 33 of Ajmer Laws Regulation, parties must be held to the terms of their contract.

*MOTI LAL NAND LAL vs. KELA. **4—I**

—S. 251—*Acknowledgment by one partner or contractor—Authority to bind others can be inferred*—The authority of one partner to sign acknowledgments so as to bind other partners may be inferred from circumstances. The same principle applies to co-contractors.

PANCHU LAL vs. MOHAN LAL. **39**

Co.ts.

—Of Execution—The most suitable time for claiming costs of Execution is when the sale proclamation is drawn up, but a request made at any time before the Darkhast is finally disposed of is not too late.

*POOSA MAL vs. HANGAM KOER. **5—II**

Court Fees Act.

—S 7—*On allegations in plaint*—A plaint should be stamped on the allegations contained in it and not on the allegations of the defendant.

CHAIBRI BAI VS. NOOR MOHAMMED. 46

—S 7 *Plaintiff can always effect saving of court fees by reducing his claim if otherwise permissible*—It is always open to a plaintiff or an appellant to reduce his claim and effect a saving of court-fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final and the appeal is limited to the amount in contest on which alone court fee need be paid. It is for the court in each case to determine whether the reduction is otherwise permissible.

B. B. & C. I. RY. CO. VS. EDWARD MILLS CO. LTD. BEAWAR. 53.

—Sch I, Art 1.—Sch. II, Art 17 (i or vi)—*scope of*—When a first appeal is rejected for failure to pay proper court fee or is dismissed as time barred for the same cause, Art 17 (i or vi) of the second schedule has no application and the second appeal should be stamped ad valorem under sch. I, Art 1.

HIRA LAL VS. HAZARI MAL JETHMAL. 16

—Sch. II, Art. 17 (i)—*Possession in suit under O. 21, R. 103 C. P. C.*—When possession is claimed in a suit under O. 21, R. 103 C. P. C. which is based upon title the proper court fee payable is Rs. 10/-

CHAIBRI BAI VS. NOOR MOHAMMED. 46

Criminal Procedure Code.

—S 237—*Wrong section in complaint—conviction under different section not bad —The essence of a complaint is the facts set out in it.* The mention of a wrong section does not invalidate a private complaint and there is no reason why a different rule be applied to a complaint filed by an officer of Government. A conviction under S. 471 I. P. C. on a complaint under S. 193 I. P. C. is not bad if the conviction is based on the facts set out in the complaint.

JAGATRAM VS. CROWN. 35

—Ss. 238, 537—*Not applicable to difference offences*—When a man is charged with one offence and without altering the charge is convicted of another offence, different in kind, the conviction is bad 'in law'. Section 537 of the Cr. P. C. cannot cure such a defect.

A. POOLAR VS. GATUR. 51

Limitation Act.

—Sec. 5—*Time extended for payment of deficit, suo motu, by court—Payment made after expiry of Limitation—Respondent not precluded from urging at hearing that appeal is time barred.*—Where the court of its own motion directs deficient Court fee to be made up and court fee is made up after the period of limitation has expired, it is still open to the other side to plead that the appeal is time barred. The hearing of the appeal is proper time to urge this objection.

HIRA LAL vs HAZARIMAL JETHMAL. **16**

—Art 7 or 102—*Washerman—Artisan or labourer*—A *dhobi* is not an artisan or a labourer and a suit by him for services rendered is governed by Art. 102 and not Art. 7. In absence of agreement a *dhobi* is entitled to reasonable remuneration for his services.

*TAJAMAL HUSAIN vs. MD. BUX. **1—I**

—Art 75—*Bond payable by instalments—Limitation runs from default* When a bond is payable by instalments the ordinary rule is that limitation runs from default. Limitation is to be decided on the claim as set out in the plaint and not on a claim which might have been made.

ABDUL GHANI vs. AKBER KHAN. **41**

—Art 102—*See under Art 7.*

—Art. 168 When the appellant had no notice of the hearing he can have resort to Section 151, because O 41, R 19, read with article 168 of the Limitation Act pre-supposes the proper service of summons on the appellant.

*MATHRA vs. KALYAN MAL. **7—II**

Practice.

—Appellate Court—*not bound to hear suo motu Appeal up to the value on which court fees paid*—An appellate court is not bound suo motu to hear an appeal upto the value on which the court fee is paid It is for the parties to put their case before the court and it is not open to a party who failed to claim a relief to say that it was the court's business to give it to him without being asked to do so.

B. B. & C. I. RY. CO. vs. EDWRD MILLS CO. LTD. BEAWVR. **53**

—Court Fees—*deficient cannot be recovered by attachment after decree* where after the passing of a decree it is found that the plaint was improperly stamped, it cannot be recovered by attachment of plaintiff's immoveable property.

*CHAGAN LAL vs. CHAGAN LAL, **3—I**

Provincial Insolvency Act.

—S. 10 (1—a)—*"Debt" includes secured debt*—The word 'debt' includes a secured debt. A debtor's petition under section 10 can therefore include secured debts to make up the statutory total of Rs. 500/-

BHAGWAN DAS vs KANA. **44**

—S. 33 & S. 59—*Schedule rightly or wrongly framed—Payments cannot be questioned*—If a receiver makes a payment towards a debt which is entered in the Schedule, framed under S 33, such payment is according to law even though the debt is one which should not have been entered in the Schedule, e. g. Schedule whether rightly or wrongly framed is Res Judicata as regards payments actually made under it.

BADRI LAL vs. BAKHTAWAR ALI. **23**

—S. 35 & S. 37—*Adjudication annuled—Refund of moneys paid—Inherent powers*—Insolvent applied for discharge. The Judge annuled the adjudication under S. 35 on the ground that the insolvent had not been rightly adjudicated an insolvent as the major portion of the debts were due not from the insolvent but his father. Subsequently insolvent applied for refund of moneys paid out by the receiver to the creditors of his father This was allowed under S. 37. *Held*, (i) though S. 37 does not itself authorise an order of the nature made, yet in so far as such an order is based on the same grounds as the order of annulment itself, the court has inherent powers to make it, (ii) such an order must be made at the same time as the order of annulment and not subsequently.

BADRI LAL vs. BAKHTAWAR ALI. **23**

—S. 56 (2—b)—*Receiver's Commission*—When an encumbered property is sold by the Receiver in bankruptcy of his own motion the receiver is entitled to his commission only on the balance of the sale proceeds which is available for distribution among the unsecured creditors. But when a secured creditor comes to court and asks that the Receiver should sell the mortgaged property he does consent by necessary implication to the Receiver getting his commission on the whole sale proceeds.

*BIRADH MAL LODHA (R. B. SETH) vs. PRABHU DAYAL. **6—II**

—S. 59—*See under S. 33.*

—S. 75 (1)—*Person aggrieved—Meaning of—Whether appeal lies on error in procedure*—A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully effected his title to something.

Provincial Insolvency Act.—*Contd.*

A person cannot be said to be aggrieved by a legal error in procedure only which does not affect his substantive rights.

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B. B & C. I. RY. vs. BISHAN LAL MOTI LAL. 5

—S. 72—Risk Note Form H—*Misconduct—Burden of proof*—The consignor has to prove misconduct on the part of Railways Company's servants

B. B. & C. I. RY vs. BISHAN LAL MOTI LAL. 5

—S. 72- Risk Note Form H—*Misconduct—Effect of*—Misconduct on the part of Railway Administration does not render the Railway Company liable under the Risk note.

B. B. & C. I. RY. vs. BISHEN LAL MOTI LAL. 5

—S. 72 Risk note X—*Burden of proof—Railway must prove Loss—Non-delivery does not amount to loss* - Mere non delivery does not amount to loss. In suits based on non-delivery the Railway Company must prove loss affirmatively.

B. N. RY. & B. B. & C. I. RY. vs. SITĀ RAM AJODHIA PERSHAD.

Railways Act (IX of 1890)—*Contd.*

—S. 80—*Liablity of other Railway*—A Railway to whom the goods were not in the first instance consigned cannot be held liable unless the loss is proved to have occurred on its system.

B. N. RY. & B. B. & C. I. RY. vs. SITA RAM AJODHYA PERSHAD. 64

—S 80—*Receiving Railway not agent*—The Railway Company receiving a consignment for despatch to a place on another Railway is not an agent of the Railway Company which has to deliver it.

B. N. RY. & B. B. & C. I. RY. vs. SITA RAM AJODHYA PERSHAD. 64

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—S. 2 (II) and 17—An instrument which is stamped after execution is not duly stamped.

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—Libel—*Damages*—There are some cases in which proof of special damage is unnecessary and these include the imputation of a criminal offence punishable with imprisonment.

*G. CORNELIUS vs. REV. LAKSHMI CHAND. 6—II

—Libel.—*Privilege*—Privilege other than absolute is no defence if there is malice.

*G. CORNELIUS vs. REV: LAKSHMI CHAND. 6—*II*

Transfer of Property Act.

—S. 107—*Qabuliat coupled with transfer of possession—can form basis of suit*—A Qabuliyat signed by the tenant amounts to an agreement to lease and coupled with transfer of possession gives a cause of action for a rent suit.

BENI GOPAL vs. ABDUL RAHMAN. 43

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AJMER.

Civil Second Appeal No 17 of 1933.

BEFORE MR. D. R. NORMAN I. C. S.

Piroo Lal son of Ladu Ram Brahmin of Pushkar - *Appellant.*

Versus.

Jatan Lal son of Chitar Mal, Brahmin (2) Mst. Har Piyari widow of Ladu Ram Brahmin of Pushkar *Respondents.*

Finding of fact—when can be interfered with in second appeal:

A finding of fact cannot be upset merely on the ground that it is against the weight of the evidence nor on the fact that the judge has not in his judgment referred to all the evidence, on the record. It is only when there is no evidence at all for the fact held to be proved or where evidence is disbelieved for no reason at all that the High Court will interfere in second appeal.

Date of Judgment 22nd June 1933.

Counsel:—Mr. H. C. Sogani for the *Appellant.*
Mr. Mohan Lal Capoor for the *Respondents.*

Subject matter of the case.

Appeal against the judgment and decree dated the 15th December 1932 passed by the Additional District Judge, Ajmer in Civil Appeal No. 152 of 1929.

Order.—The only issue in this appeal relates to the alleged adoption of appellant by respondent No. 2. The lower appellate Court has held that the factum of adoption is not proved, and that if it did take place it was not legal. The finding that the adoption did not actually take place is a finding of fact and therefore binding upon this court. It is true that neither of the Courts below have treated the question in very satisfactory way. In para 4 of his j[illegible] the trial Judge says.

"I find that the factum of adoption has not been satisfactorily proved."

But in para 6 he says,

"It is however very likely that an adoption did happen."

The Additional District Judge is more definite, but not as definite as he should be. He begins by saying "as to the factum I agree with the court below that the evidence as to the ceremony is very discrepant and unrealiable". I doubt whether any ceremony took place at all". But he then goes on to say,

"So although there is no reliable evidence as to the ceremony of adoption there is evidence that such a relationship was sought to be established and was held by the lady to have been established and in that sense it may be said that the factum is proved".

I have considered whether in view of this last remark there is any finding at all on the factum of adoption. I think however that this remark can only mean that the parties supposed that there was an adoption whereas in fact there was none. This being so there is a finding of fact that the adoption did not take place and as this finding is based on a criticism of the evidence in favour of the adoption it is binding on this court. A finding of fact connot be upset merely on the ground that it is against the weight of the evidence; nor on the fact that the judge has not in his judgment referred to all the evidence on the record. It is only when there is no evidence at all for the fact held to be proved or where evidence is disbelieved for no reason at all that this court will interfere in second appeal. I would at the same time invite the attention of both the courts below to the importance of giving clear and definite findings of fact together with the reasons for those findings. If this were done much trouble would be saved in this Court.

I confirm the decree of the lower appellate Court and dismiss this appeal with costs.

Appeal dismissed.

Civil Revision Application No. 39 of 1933.

BEFORE MR. D.R. NORMAN I.C.S.

Mahendra Singh Brothers Amritsar represented by Sardar Sutendra Singh, Sardar Sarnagat Singh and Sardar Tanendra Singh minor under the guardianship of Mela Ram residents of Amritsar, Punjab ... . *Applicants.*

Versus

R.B.S. Tikam Chand son of R.B.S. Nemi Chand of Ajmer .... *Plaintiff,* and (2) Sardar Jaswant Singh son of Sardar Bahadur Kishen Singh of Ajmer .... *Opposite Party.*

Assignment of promissory note-whether entitles assignee to file a suit at place of assignment:—

The assignment of a promissory note at a particular place is a part of the cause of action and gives the assignee the right to file a suit on the promissory note at the place of assignment.

371 C 681
1933 Sind 179 (A.I.R.)
22 Cal: 451 Foll:
65 I.C. 65
1929 Cal. 306 (A I.R.) Dist.

Date of Judgment: 26 6 1933.

Counsel.—Mr. Jasoda Nandan for the ... ... *Applicant.*
Messrs Ghisu Lal and Lekh Ram for the ...*Opposite Party.*

Subject matter of the case.

Application for revision under Section 115 of the Code of Civil Procedure against the order dated the 7th December 1932, passed by the Additional District Judge, Ajmer, in Misce: Case No. 11 of 1931.

Order.—The question which arises in this application is whether the Additional District Judge Ajmer has jurisdiction to try a suit based on a promissory note, solely on the ground that the promissory note was assigned to the plaintiff at Ajmer. The learned Additional District Judge held that he has following the ruling in *Manepalli Mangamma versus Manepalli Sathiraju* (37 I.C. 681). A similar view has been taken in *Seth Wadhumal vs. Mallik Noor Ahmad* (1933 Sind 179.) In *Roghoonath Misser vs. Gobindnarain* (22 Cal 451) it was held that the endorsement of a *hundi* (which corresponds to the assignment of a promissoy note) was part of the cause of action and gave the right to file a suit at the place of endorsement On the other side Mr. Jasodha Nandan has referred to *Tekchand vs. Mahadeo* (65 I.C. 65) and *Sew Baran Saw vs. Ram Charitra Dubey* (1929 Cal. 306) Neither of these cases is to the point. In the former case the question was whether the assignee of pawned goods could demand that the goods be delivered to him, where he resided, and on failure of delivery file a suit at that place. In the latter case it was held that a clause in the assignment of a promissory note that the promissory note was to be paid at a particular place did not give the assignee the right to sue at that place. In neither case was the question whether the assignee could sue at the place where the assignment was made in point. It may seem somewhat unreasonable that the number of places at which one party to a contract can sue the other should be liable to be increased by the act of one party to other contract only. I personally think that it is, and had the matter been resintegra I should have been inclined to decide other-wise. But all the authority being on one side I feel bound to follow it.

The application is dismissed with costs.

Application dismissed.

Small Cause Court Revision Application No. 13 of 1933.

BEFORE MR. D. R. NORMAN I. C. S.

The B. B & C. I. Railway Company through its Agent at Bombay .... *Applicant*

Versus

Firm Bishan Lal Moti Lal of Nayabazar, Ajmer

Opposite Party.

(a) Suit for non delivery-Whether Railway can claim protection of Risk Note without proving loss:

In a suit for non delivery the Railway must prove loss strictly before it can claim the protection of a risk-note.

3 A. M. L. J. 3 Foll.

(b) Risk Note Form H—Whether misconduct of a Ra lway Administration renders it liable there under.

Under Risk Note Form H the consignor has to prove misconduct on the part of Railway Company's servants. Misconduct on the part of Railway Administration does not render the Railwav Company liable under the Risk note. The proviso to the risk note which lays down that the consignor need not prove misconduct if such misconduct on the part of the Railway Administration or its servants can be inferred from the evidence produced by the Railway to disclose how the consignment was dealt with while in its possession is as regards the words "Railway administration" inconsistent with the body of the note and to that extent cannot be given effect to.

54 Bom 105 Foll:
1930 Patna 559 (2) } A. I. R.
1931 Cal: 734 (2) }
Dissented from

Date of Judgment: 26-6-3

Counsel: Mr. K. S. Mathur for the... ... ... *Applicant.*
Mr. Mohan Lal Capoor for the ... *opposite party.*

Subject matter of the case.

Application for revision under Section 25 of the Provincial Small Cause Courts Act IX of 1887 against the Judgment dated the 30th November 1932, passed by Railway Magistrate and Judge Small Cause Court, Ajmer in suit No. 16 of 1931.

Order—The suit out of which this application arises was filed by opponent to recover the value of one bale of cotton piece goods booked from Carnac Bridge to Kishengarh, and not delivered. The defence of the Railway Company was that the bale had been lost in transit and that it was protected under risk note H. The material issue framed was:—

'Was the loss of the bale due to any misconduct of the Railway Administration's servants and is the Railway Company bound to make good this loss ?'

The Court directed that the Railway should first lead evidence to show how the bale was dealt with. From this evidence it would appear that it was loaded in wagon No. 15833 at Sabarmati; that the wagon was riveted and sealed; that at Sidhpur Station the seal was found broken and rivet missing; that the wagon was resealed and checked at Abu Road when two packages were found missing of which one was consigned to the plaintiff. Evidence was further given that the train was checked *i. e.* the seals examined, at Kamli. The presumption therefore was that the bale had been lost while the train was running between Kamli and Sidhpur Stations. The trial Court held that :—

(1) That there was misconduct on the part of the Railway Administration in that the wagon was not pad-locked;

(2) That the Guard and the Chaukidars were guilty of misconduct in not keeping a better look out or in the alternative that the bale was never loaded at Sabermati.

In this court the Railway company contend,

(1) that it should not have been ordered to lead evidence;

(2) that misconduct of its Administration does not render the Railway liable,

(3) that any how there was no such misconduct;

(4) that there was no misconduct on the part of the Company's servants

In reply the plaintiff besides contesting the above points has relied on the finding of the trial Court that there was no proof of loss.

I propose to take this last point first. It was held in *Kanhya Lal Perbeen Chand* VS *The B. N. Railway* (3AMLJ 3) that in a suit for non-delivery the Railway must prove loss before it can claim the protection of a risk note. But the issue in the trial court assumed loss and did not call upon the Railway to prove it and the plaintiff did not raise any objection to the form of issue. Mr. Mathur is therefore I think justified in arguing that loss was admitted and that the trial Court ought not to have considered the point at all. I am moreover satisfied that loss is sufficiently proved. It is argued that the trial Court's finding that it is not being one of fact ought to be accepted But that finding was not a definite one but merely an alternative one and seems to be based more on the trial Judges belief that the removal of the bale from a running train unobserved was an impossibility than on any reasoned criticism of the evidence. The evidence of defendant's witnesses 2, 9, 10 and 11 shows that the bale arrived at Sabermati in broad guage wagon No. 6285 and was transferred to narrow guage wagon No. 15833. These witnesses were hardly

cross-examined at all and I see no valid reason for discarding their evidence. Mr. Mohan Lal then argues that proof that the bale was loaded in a wagon and that the wagon was after-wards found with the seals broken and the bale missing is not proof of loss and cites *Brindaban* VS *G. I. P. Railway Company* (1926 All. 369). But all that case decided was that such evidence is not proof of robbery and the decision was based on the technical distinction between robbery and theft.

I now come to the points taken by applicant. I do not propose to deal with the first one namely whether the Railway should have been asked to begin as Mr. Mathur states that he does not want a re-trial. I am asked to lay down a general rule but I consider this unnecessary as obviously in a case of loss the consignor can always compel the Railway to begin by insisting on strict proof of loss.

The second point is whether misconduct on the part of he Railway Administration renders the Railway liable under risk note "H". On this point there is a conflict of rulings. To appreciate them it is necessary to summarize he terms of the note. Risk note "H" frees the Railway company from liability for any loss to a consignment from any cause whatever except upon proof that such loss arises from the misconduct of *the Railway Administration's servants.* Then follows a proviso compelling the Railway, in certain cases to disclose to the consignee how the consignment was dealt with while in possession of the Railway. It concludes as follows:—

"If misconduct on the part of the *Railway Administration or its servants* cannot be fairly inferred from such evidence the burden of proving such misconduct shall lie upon the consignor". It will be observed that in main [illegible] expression used is the *Railway Administr[illegible]* while in the proviso the expression is the *Ra[illegible] tration or its servants.*

The first case on the point is *B. B. & C. I. Railway vs. The Rajnagar Spinning Weaving and Manufacturing Co.* (54 Bombay 105). In that case Kemp Ag. C. J. pointed out that what the consignor had to prove was not misconduct on the part of the Administration but misconduct on the part of the Company's servants. He did not however refer to the words used in the proviso. The next case is *B. N. Railway Company vs. Hukumchand Hardat Rai* (1933 Patna 559- 2). In that case James J. held that the Railway was liable on proof of misconduct on the part of its Administration. He differed from the Bombay case as to the meaning of misconduct but does not appear to have noticed the distinction drawn therein between the Railway Administration and the Company's servants. The third case is *Secretary of State vs Dhokalmal* (1931 Calcutta 734-2) in which the Patna ruling was followed. Mitter J. noticed the distinction between the two expressions referred to but held that the Railway was liable for the misconduct of its Administration in all cases covered by the proviso.

The trial Judge preferred the Calcutta view, but in my judgment the correct view is taken in the Bombay case. To me the two expressions appear to be a contradiction in terms due to careless drafting or printing. The two portions of the risk note are not *inpari-materia*. The first deals with liabilities the second with burden of proof. The first part lays down that the Railway is liable only upon proof of certain thing, namely misconduct by its servants. The proviso frees the consignor in certain cases from the burden of proving that thing affirmatively. So far all is clear but the proviso also frees the consignor from proving another thing namely misconduct on the part of the Administration which thing will not under the main portion affect the liability of the Railway. To that extent the proviso is otiose and meaningless. It follows from this that in construing the risk note the main portion alone may be given [illegible].

to so far as it is in contradiction with the proviso. For the proviso is merely a rule of evidence and cannot confer a substantive right. To say that a certain thing may be taken as proved is not to say that it has any legal effect and the proviso therefore cannot be taken to modify the precise wording of the main portion.

I am fortified in this conclusion by the fact that in the former risk note "H" the Railway were made expressly liable for wilful neglect (now replaced by misconduct) on the part of its Administration. The omission of these words from the present risk-note cannot I think be accidental. There was no proviso to the former risk note so its wordings cannot be compared with that of the present risk note.

In this view of the law it is not necessary for me to consider whether the failure to provide pad-lock was misconduct on the part of the administration. But in my view it was not. The trial Judge in coming to his conclusion omitted to consider the protection afforded by riveting. I have been to Ajmer station and have in the presence of counsel on both sides seen how the device works. In my opinion it affords considerable protection and would prevent the wagon's door being opened by any but an expert thief provided with the necessary tools. Obviously it would be impracticable for the Railway to provide an individual pad-lock for every wagon and in my opinion a rivet affords at least as much protection as a general pattern of pad-lock.

The last point is whether misconduct on the part of the company's servants is proved. Here again the trial Judge's finding of fact is not definite but in the alternative, and is based on his notion that the removal of large bales by thieves must have been perceived by the Guard or the chaukidars. But the trial Judge also admits that as the night was dark and rainy the chaukidars would not have seen anything if they had been looking out. It is therefore not obvious how

he infers from their not seeing anything that they were not looking out. The noise made by the bale falling would not be audible above the noise of the train and it may be presumed that the bale was not removed from the side of the line until the train had passed. If the Chaukidar had his eye fixed on the wagons he might easily fail to notice the bale lying by the side of the track. For these reasons I am unable to hold that theft of the bale from the train while it was running was a physical impossibility or that failure of the guard and chaukidars to observe it sets up a reasonable inference of misconduct on their part. I think that the trial Judge's finding on this point is not warranted by the proved facts and ought to be set aside.

I allow the application set aside the decree of the trial Court and dismiss opponents suit with costs throughout.

Application allowed.

Civil Second Appeals No. 13 and 14 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

Lala Nand Kishore son of Lala Sheo Raj Kayasth of Ajmer	C. S. A. 13/33.	*Appellants.*
Lala Kanhiya Lal son of Lala Ram Gopal Kayasth of Ajmer	C. S. A. 14/33	

Versus.

Lala Bhairon Narain and Sheoji Ram sons of Lala Bhura Mal Kayasth of Ajmer ....*Respondents.*

Can Executing Court question jurisdiction of court which passed the decree: If so when,

It is not open to an Executing Court in Execution proceedings to question the jurisdiction of the Court which passed the decree Two exceptions to this rule are apparent—(1) When a decree is against a dead person and (2) When a decree is of a foreign Court.

9 Rangoon 480.

44 Cal 627—Foll.

53 Cal· 166

1932 Cal 380 (A. I. R.) Dissented from.

Date of Judgment· 30-6-1933.

Counsel· Messrs Jasoda Nandan and Kaushal Das for the *Appellants.*
Mr. Ghisu Lal for the . ... *Respondents.*

Subject matter of the case.

Memo of appeal against the judgment and Decree dated the 28th November 1932, passed by the Additional District Judge, Ajmer in Civil Appeal No. 39 of 1932.

Order.—These two appeals arise out of two applications to execute a decree for costs passed by this Court in Civil Second Appeal No. 45 of 1928. That decree ordered Kanhiya Lal (appellant in C S. A No 14 of 1933) to pay 1/3rd and Nand Kishore (appellant in C S A No 13 of 1933) to pay 2/3rd of the costs of the present respondents. The applications to execute this decree were objected to on the ground that the Judicial Commissioner had no jurisdiction to hear the appeal and pass the decree. The trail Court overruled the objection and its decision was upheld in appeal by the learned Additional District judge.

The learned Additional District Judge has held that the jurisdiction of a Court passing a decree can be questioned in execution but that in the present case the decree was not without jurisdiction. In view however of certain recent rulings the former proposition requires consideration. In my view it is not open to an executing Court to question the jurisdiction of the Court which passed the decree.

In *Kalipada Sarkar Vs Hari Mohan Dalal* (44 Cal 627) it was sought in execution to challenge a decree on the ground that the judgment-debtor was a lunatic and had not been properly represented at the trial. The Court held that the decree could not be challenged and remarked :—

"We are of opinion that the safest course to follow is to adhere rigidly to the established principle that every order and judgment, however erroneous, is, in the words of Lord Cottenham in Chuck vs. Cremer, good until discharged or declared inoperative, and that the excution Court cannot enquire into the validity or propriety of the decree"

In *Gorachand Haldar vs. Prafulla-Kumar Roy* (53 Cal. 166) a mortgage decree had been passed as regards land over which it was held that the Court had no jurisdiction. The decree being challenged in execution the following point was referred to a Full Bench.—

"Where a decree having been passed by a Court having no jurisdiction to pass it is void and nullity is the execution Court competent to question its validity and refuse to execute it ?"

The point was decided in a very short judgment. Walmsley J. after emphasizing the difference between want of jurisdiction and the irregular exercise of it said —

"I think it may be said that the correct view, and the view for which there is a strong current of authority, is that where the decree presented for execution was made by

Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits I think that the executing Court is authorised to question the validity of a decree."

With all due respect it is not easy to reconcile these remarks with those quoted from the judgment in *Kalapada Sarkar vs. Hari Mohan Dalal.* That case though cited both in the referring judgment and in arguments, was not referred to by Walmsley J.

In *Amalabala Dasi vs. Sarat Kumari-Dasi* (1932 Cal. 380) the Court followed *Gora Chand Haldar vs. Prafulla Kumar Roy* but explained the meaning of "apparently" as used in that case. They held that want of jurisdiction must appear from the decree itself (including the papers relevant for understanding it) and that if the want of jurisdiction could only be proved by evidence it could not be raised in execution.

The same point came before a Full Bench of the Rangoon High Court in *S A. Nathan vs. S. R. Samson* (2 Rangoon 480). The Court dissented from the decision in *Gora Chand Haldar vs. Prafulla Kumar Roy* and held that an executing Court could not challenge the validity of a subsisting decree passed by a Court duly constituted by law.

The last case is *Kalicharan Singha vs. Bibhutibhushan Singha*(60 Calcutta. 191). There the decree was contested in execution on the ground that the judgment-debtor was at the time of the suit a lunatic. Costello J. held that the decree could not be challenged on this ground because the want of jurisdiction was not apparent in accordance with the meaning given to that word in *Amalabala Dasi vs. Sarat Kumari Dasi.* But he also quoted a portion of Page C. J's judgment

in *S. A. Nathan vs. S. R. Samson* which held that *Gora Chand Haldar vs. Prafulla Kumar Roy* was wrongly decided and continued "With the views expressed in that passage I respectfully agree." In view of these remarks by a Judge of the same Court the authority of Gora Chand Haldar's case is considerably shaken.

In the remaining cases cited before me though there are expessions in them approving of the view taken in *Gora Chand Haldar vs. Prafulla Kumar* Roy yet on the facts it was held that the decree could be challenged. The remarks in favour of the view in *Gora Chand Haldar vs. Prafulla Kumar* Roy were thus obiter and I do not think it necessary to cite those rulings.

In my judgment the correct view is taken in *S. A. Nathan vs. S. R. Samson.* As Page C. J. points out if a decree is allowed to be challenged in execution, the effect is really to constitute a further Court of appeal. The Court which passes a decree has jurisdiction to decide whether, it has or not jurisdiction, and the fact that it passes a decree is a finding, explicit if the point is raised, implicit if it is not, that the Court has jurisdiction. Page C. J. also points out that there is no logical ground for the distinction between want of jurisdiction which is apparent and that which must be established by evidence. If the plea of want of jurisdiction is a valid one then it ought not to be shut out on the ground that the investigation of it will cause the Court a good deal of time and trouble.

Further the word "jurisdiction" is one on which a wide interpretation has been put as can be seen from a perusal of any commentary on Sec. 115 Civil Procedure Code. In the same case Carr J. points out that under Sec. 3 of the Limitation Act a suit instituted out of time must be dismissed even if limitation has not been set up as a defence. It is thus

arguable that a decree passed in a time barred suit is passed without jurisdiction. Yet it has never been suggested that this point can be taken in execution.

For the above reasons I hold therefore that it is not open in execution proceedings to question the jurisdiction of the Court which passed a decree. This proposition is subject to the exceptions pointed out in *S. A. Nathan vs. S. R. Samson.* For example a decree against a dead person cannot be executed and the rule will not apply to a decree of a foreign Court which is executable in British India. The first is not really an exception since as pointed out by Page C. J. the real reason why such a decree cannot be executed is that there is no body against whom it can be executed. The second apparent exception arises because foreign Courts are not governed by the provisions of the Civil Procedure Code.

As I take this view of the law it is unnecessary to discuss whether this Court had or had not jurisdiction to hear Civil Second Appeal No. 45 of 1928.

The appeals fail and are dismissed with costs

Appeals dismissed.

Civil Second Appeal No. 65 of 1932.

BEFORE MR. D. R. NORMAN I.C.S.

Hira Lal son of Roop Chand Mahajan of Beawar

Applicant.

Versus

Firm Hazari Mal Jeth Mal of Beawar through its proprietor and manager Panna Lal son of Fateh Chand Mahajan of Beawar .... *Respondent.*

(a) Court-fee Act-Article 17 of the Second Schedule. Application of:

When a first appeal is rejected for failure to pay proper Court fee or is dismissed as time-barred for the same cause, article 17 (1) or (6) of the second schedule has no application and the second appeal should be stamped ad valorem under article I of the first schedule.

1927 Nagpur 100 (A.I R.) Dissented from.

(b) Valuation of appeal doubtful. Proper procedure.

When it is doubtful how an appeal is to be valued the proper course for the appellant is to ask for the opinion of the Court.

(c) Time extended for payment of deficit, suo motu by Court-Payment made after expiry of limitation-is respondent precluded from urging at hearing that appeal is time barred.

Where the Court of its own motion directs dificient Court fee to be made up and Court fee is made up after the period of limitation has expired, it is still open to the other side to plead that the appeal is time-barred. The hearing of the appeal is a proper time to bring forward this objection.

C.S.A. No .4 of 1929. (Het Ram versus Madho Lal) and Civil Revision No. 12 of 1933. (B. B. & C. I. Railway versus The Edward Mills) Foll:

1923 Mad: 82. Dissented from

Date of Judgment 30 6-1933.

Counsel Mr. Jasoda Nandan for the ... ... *Appellant.*

Mr Mohan Lal Capoor for the ... .. *Respondent.*

Subject matter of the case.

Memo of appeal against the Judgment and Decree dated the 19th August 1932, passed by the Additional District Judge, Ajmer in Civil Appeal No. 177 of 1929.

Order.—In this second appeal a preliminary objection is taken that it is not properly stamped. Respondent filed a suit to recover Rs. 1534 and obtained a decree. Present appellant appealed but his appeal was rejected as time barred because he did not pay the full Court fees within the period of limitation. Appellant has now preferred this second appeal on a stamp of Rs. 10/-. The memo of appeal states that "the valuation in second appeal is incapable of valuation" and that it is therefore stamped under Art. 17 (6) of Schedule II of the Court Fees Act.

2. Mr. Jasodha Nandan for the appellant has been able to quote one authority only *Govinda* vs. *Bansi Lal* (1927 Nag. 100). In that case a first appeal was rejected for failure to pay proper Court fees and it was there held that Art. 17 (1) or (6) applied to an appeal from the order of rejection.

3. Mr. Mohan Lal for respondent distinguishes that case on the ground that here the appeal was rejected as time barred. Looking to the *ratio decidendi* of the case I do not think the distinction is warranted. But I am not able to agree with the decision. Art. 17 applies to a plaint or a memorandum of appeal in certain kinds of suits. Admittedly the present suit is not out of those kinds. On the other hand I see no difficulty in applying Art. I of Schedule I. Appellant desires relief to the extent of Rs. 1534/-. It is true that success in this appeal will not of itself give appellant that relief, since this Court could only pass an order of remand. But it is equally true that unless appellant succeeds in this appeal he cannot get that relief. I therefore think it fair to say that the value of the subject matter in dispute is Rs. 1534/-. To hold otherwise would be to hold that an appeal against any decree decided on a preliminary point would not fall under Art. I of Schedule I. Further Sec. 13 of the Court fees Act which provides for refund of Court fees when a suit or an appeal is remanded relieves appellant of

any hardship he might suffer by having to pay full Court fees for a proceeding which cannot alone give him the required relief.

4. I therefore uphold the preliminary objection.

5. Mr. Jasodha Nandan then asks that he may be allowed under Sec. 149 Civil Procedure Code to make up the deficiency in Court fees. Mr. Mohan Lal argues that appellant cannot be said to have acted in good faith, since he had no good authority for the view he took. When it is doubtful how an appeal is to be valued the proper course for the appellant is to say that he is doubtful and ask for the opinion of the Court. Appellant has not done this. But his appeal memo does state definitely how his valuation was arrived at. I am therefore inclined to grant time under Sec. 149, but appellant must pay costs of this hearing which I assess at Rs. 50/-

6. I allow appellant 15 days time to make up the deficit Court fees. The costs of this hearing must also be paid into Court within 15 days.

Final Order.—This is a second appeal against the decree of the learned Additional District Judge dismissing appellant's first appeal as time barred. The facts are briefly as follows:-

The appeal was filed on 21-3-29. The proper court fee was Rs 157/8/- but stamps of Rs. 5/- only were attached. There was no prayer for time to make up the deficit. The deficit was pointed out by the office on 15-4-29 and an order was made directing appellant to make good the deficiency by 2-5-29, by which date the period of limitation for the appeal had expired. No one appeared on that date but on 4-5-29. Mr. Jasodha Nandan appeared and asked for an extension of time which was granted till 18-5-29. There was no appearance on that date, nor on the next date but two extensions

were none-the-less given. On 22-7-29 a further extension was granted and the deficit was eventually made good on 29-7-29. When the appeal came on for hearing respondent objected that it was time barred and this view was upheld by the learned Additional District Judge.

The first point taken is that once the Court has allowed full Court-fee to be paid the payment relates back to the presentation and the appeal is in time. This point was considered by Shannon J. C. in *Het Ram VS Madho Lal* (C. S. A. No. 4 of 1929) and again by me in the *B. B. & C. I.* Ry. VS *The Edward Mills* (Civil Revision No. 12 of 1933). In both cases it was held that where the Court of its own motion directs deficient Court fee to be made up, and that Court fee is made up after the period of limitation has expired it is open to the other side to plead that the appeal is time barred. I would observe here that Mr. Mohan Lal for respondent contends that when the Court grants an ex-parte extension of time after considering an application put forward by the appellant it is still open to the respondent to contend at the hearing that the appeal was time barred. It is however unnecessary to consider that point here.

In view of the two rulings of this Court already quoted, I asked Mr. Jasodha Nandan whether this case can be distinguished. He replied that those rulings only hold good when an immediate application is made by the respondent. This was done in Het Ram's case but not in the *B. B & C. I.* Ry. *vs The Edward Mills.* In support of the distinction Mr. Jasodha Nandan relies on *Murugappa Naicker vs Thayammal* (1923 Madras 82) in which it was held that if an appeal is admitted after limitation by an order of the Court the other-side must at once apply for setting aside that order and cannot wait until the appeal is set down for hearing. In that case Court's order appears to have been made on an application by the appellant and it was held that the respondent must have had notice of it. In the present case there is

nothing to show that the respondent had notice. It is true that in 1932 he appeared to contest a stay order but it does not follow that for that purpose he went through all the papers of appeal. In any case with all due respect I am not inclined to agree with that ruling. In my judgment the hearing of the appeal is the proper time to bring forward all objections whether they be preliminary or go to the root of the matter.

My finding then is that respondent was entitled to object that the appeal was time barred.

The next question is whether appellant should have been given the benefit of Sec. 5 of the Limitation Act. Appellant's case is that he lost the stamp and could not raise money for another stamp. This contention is not supported by an affidavit. If it were so it was the duty of appellant to state this fact when he filed his appeal and to ask for an extension of time then. Further no explanation has been given of the appellant's subsequent failure to appear twice and pay the money. It is unfortunate that the Court did not reject his appeal then and there, but its omission to do so cannot prejudice the rights of the respondent. I hold that the appellant had made out no case under Sec. 5 of the Limitation Act.

I confirm the decree of the lower appellate Court and dismiss this appeal with costs.

Appeal dismissed.

Small Cause Court Revision Application No. 57 of 1933.

BEFORE MR. D R. NORMAN. I. C. S.

Abhey Raj son of Mool Chand Mahajan of Bhagwanpura *Plaintiff-Applicant.*

Versus.

Nand Singh son of Bhar Singh Rajput of Nand

Defendant, Opposite Party.

Stamp Act—Instrument stamped after execution—Whether duly stamped.

By virtue of the provisions of section 2 (11) read with section 17 of the Indian Stamp Act it follows that an instrument which is stamped after execution is not duly stamped.

6 B. L. R 699 Dist:

Date of Judgment: 12-7-33.

Counsel: Mr. Milap Chand for the ... ... *Applicant*
Mr. Lekh Ram for the ... *Opposite party.*

Subject matter of the case.

Application for revision under Section 25 of the Provincial Small Cause Courts Act against the judgment and decree dated 15th March 1933, passed by the Judge Small Cause Court, Ajmer in S. C. C. Case No. 3502 of 1932.

Order.—Applicant filed a suit on a *Khata Baqui*. The trial Court dismissed it on the ground that the stamp was affixed two months after execution. It is contended before me.

(1) That the stamp was affixed at the time of execution;

(2) That it is immaterial when it is affixed as long as it was affixed before the *Khata Baqui* was put in evidence.

I will deal with the second point first. By Section 35 of the Stamp Act any instrument chargeable with duty may not be admitted in evidence unless duly stamped. Sec. 2 (11) provides that an instrument is not duly stamped unless a stamp has been affixed or used in accordance with the law. Sec. 17 provides that all instruments chargeable with duty and executed in British India shall be stamped before or at the time of execution. It follows therefore that an instrument

stamped after execution is not duly stamped. Moti Lal Shive Lal vs. Jagmohandas (6 B. L. R. 699) relied on by Mr. Milap Chandra deals with an instrument which was not executed in British India and the ruling is therefore distinguisheable. But on facts I find myself unable to agree with the trial Court. The stamp is placed in the middle of the document and the writing of the document goes over it. If the stamp had been affixed later one would expect to find writing under the stamp I had the stamp removed in Court and there was no such writing.

Mr. Lekh Ram suggests that a blank space might have been left with a gap in the writing. But this seems highly unlikely. I am not prepared to rely on the evidence of a single witness that the stamp was affixed later on.

I allow the application and remand the case for retrial. Costs of this application to be costs in the case.

Application allowed and case remanded for re-trial.

Miscellaneous Civil Appeal No. 25 of 1933.

AND

Civil Revision Application No. 106 of 1933.

BEFORE MR. D. R. NORMAN. I. C. S.

Badri Lal son of Seth Birdhi Chand and Kalyan Mal son of Kishan Lal Mahajan of Ajmer, Ghasiti Bazar	C. S. A. 25/30 Treated as Civil Revision No. 118 of 1933.	*Appellant.*
(2) Ram Bhajan son of Sheo Karan Mahesri of Ajmer at present residing at Jodhpur	C. R. A. 106/33	*Applicant.*

Versus.

S. Bakhtawar Ali son of Mardan Ali of Ajmer

Respondent.

Provincial Insolvency Act, sections 33, 37 and 59 interpretation of

Facts:

One Bakhtawar Ali was adjudicated an insolvent in 1916. A schedule of debts was framed and payments were made by the receiver from time to time in accordance therewith. In 1932 the insolvent applied for discharge. The Judge held that the insolvent had not been rightly adjudicated an insolvent as the major portion of the debts were due not from him but from his father. The Judge therefore annuled the adjudication under section 35 of the Provincial Insolvency Act on 25th November 1932. On 16-1-1933 the insolvent applied for a refund of moneys paid out by the receiver to the creditors of his father. The Judge purporting to act under section 37 allowed the application and the Additional District Judge confirmed this order on appeal.

On revision held:

(*a*) Though section 37 of the Provincial Insolvency Act does not itself authorise an order of the nature made, yet in so far as such an order is based on the same grounds as the order of annulment itself, the court has inherent powers to make it.

(*b*) But such an order must be made at the same time as the order of annulment and not in any subsequent proceeding.

1933 Patna 84 (A.I.R.) Distinguished.

(*c*) Payment duly made means made in accordance with law. Section 59 lays down that it is the duty of the receiver to distribute the insolvent's property among his creditors whose debts have been proved and included in the schedule framed under section 33. Therefore, if a receiver makes a payment towards a debt which is entered in the schedule such a payment is made according to law even though the debt is one which should not have been entered in the schedule. In other words the schedule whether rightly or wrongly framed is resjudicata as regards payments actually made under it.

Date of Judgment: 14-7-1933,

Counsel: Messrs Jasoda Nandan and Kaushal Das for the *Applicants*,

R. S. M. Mithan Lal for the *Respondent*.

Subject matter of the case.

Appeal against the order dated 29th May 1933 passed by the Additional District Judge Ajmer in Insolvency Appeal No. 42 of 1933.

Judgment.—Civil Appeal No. 25 of 1933 and Civil Revision No. 106 of 1933 arise out of the same judgment. The facts are briefly as follows :—

One Bakhtawar Ali was adjudicated an insolvent in 1916. A schedule of debts was duly framed and the Receiver made payments to the creditors from time to time in accordance therewith. In 1932 Bakhtawar Ali applied for his discharge. On the application coming up for hearing the Judge held that he had not been rightly adjudicated an insolvent since the major proportion of the debts that he had shown in his schedule were due not from him but from his father. The Judge therefore instead of granting a discharge annulled the adjudication under Sec 35 This was on 25th November 1932. On 16th January 1933 Bakhtawar Ali applied for a refund of moneys paid out by the Receiver to those creditors who had been held to be creditors of his father only. The Judge purporting to act under Sec. 37 of the Insolvency Act allowed the application and the Additional District Judge confirmed this order on appeal. Two of the creditors have preferred appeal No. 25 of 1933 and the third Revision No. 106 of 1933. I do not think a second appeal lies but I am willing to treat it as a revision application.

The points taken on behalf of the creditors are as follows:-

(1) The Court had no jurisdiction at all under Sec. 37 to pass the order complained of;

(2) If it has jurisdiction to make the order it could only make it as part of the order of annulment and could not pass a subsequent order;

Versus.

S. Bakhtawar Ali son of Mardan Ali of Ajmer

Respondent.

Provincial Insolvency Act, sections 33, 37 and 59 interpretation of

Facts:

One Bakhtawar Ali was adjudicated an insolvent in 1916. A schedule of debts was framed and payments were made by the receiver from time to time in accordance therewith. In 1932 the insolvent applied for discharge. The Judge held that the insolvent had not been rightly adjudicated an insolvent as the major portion of the debts were due not from him but from his father. The Judge therefore annuled the adjudication under section 35 of the Provincial Insolvency Act on 25th November 1932. On 16-1-1933 the insolvent applied for a refund of moneys paid out by the receiver to the creditors of his father. The Judge purporting to act under section 37 allowed the application and the Additional District Judge confirmed this order on appeal.

On revision held:

(*a*) Though section 37 of the Provincial Insolvency Act does not itself authorise an order of the nature made, yet in so far as such an order is based on the same grounds as the order of annulment itself, the court has inherent powers to make it.

(*b*) But such an order must be made at the same time as the order of annulment and not in any subsequent proceeding.

1933 Patna 84 (A.I.R.) Distinguished.

(*c*) Payment duly made means made in accordance with law. Section 59 lays down that it is the duty of the receiver to distribute the insolvent's property among his creditors whose debts have been proved and included in the schedule framed under section 33. Therefore, if a receiver makes a payment towards a debt which is entered in the schedule such a payment is made according to law even though the debt is one which should not have been entered in the schedule. In other words the schedule whether rightly or wrongly framed is resjudicata as regards payments actually made under it.

Date of Judgment: 14-7-1933.

Counsel: Messrs Jasoda Nandan and Kaushal Das for the *Applicants,*

R. S. M. Mithan Lal for the *Respondent.*

Subject matter of the case.

Appeal against the order dated 29th May 1933 passed by the Additional District Judge Ajmer in Insolvency Appeal No. 42 of 1933.

Judgment.—Civil Appeal No. 25 of 1933 and Civil Revision No. 106 of 1933 arise out of the same judgment. The facts are briefly as follows :—

One Bakhtawar Ali was adjudicated an insolvent in 1916. A schedule of debts was duly framed and the Receiver made payments to the creditors from time to time in accordance therewith. In 1932 Bakhtawar Ali applied for his discharge. On the application coming up for hearing the Judge held that he had not been rightly adjudicated an insolvent since the major proportion of the debts that he had shown in his schedule were due not from him but from his father. The Judge therefore instead of granting a discharge annulled the adjudication under Sec 35 This was on 25th November 1932. On 16th January 1933 Bakhtawar Ali applied for a refund of moneys paid out by the Receiver to those creditors who had been held to be creditors of his father only. The Judge purporting to act under Sec. 37 of the Insolvency Act allowed the application and the Additional District Judge confirmed this order on appeal. Two of the creditors have preferred appeal No. 25 of 1933 and the third Revision No. 106 of 1933. I do not think a second appeal lies but I am willing to treat it as a revision application.

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1933 Patna 84 (A.I.R.) Distinguished.

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Date of Judgment: 14-7-1933.

Counsel: Messrs Jasoda Nandan and Kaushal Das for the *Applicants.*

R. S. M. Mithan Lal for the *Respondent.*

Subject matter of the case.

Appeal against the order dated 29th May 1933 passed by the Additional District Judge Ajmer in Insolvency Appeal No. 42 of 1933.

Judgment.—Civil Appeal No. 25 of 1933 and Civil Revision No. 106 of 1933 arise out of the same judgment. The facts are briefly as follows :—

One Bakhtawar Ali was adjudicated an insolvent in 1916. A schedule of debts was duly framed and the Receiver made payments to the creditors from time to time in accordance therewith. In 1932 Bakhtawar Ali applied for his discharge. On the application coming up for hearing the Judge held that he had not been rightly adjudicated an insolvent since the major proportion of the debts that he had shown in his schedule were due not from him but from his father. The Judge therefore instead of granting a discharge annulled the adjudication under Sec 35 This was on 25th November 1932. On 16th January 1933 Bakhtawar Ali applied for a refund of moneys paid out by the Receiver to those creditors who had been held to be creditors of his father only. The Judge purporting to act under Sec. 37 of the Insolvency Act allowed the application and the Additional District Judge confirmed this order on appeal Two of the creditors have preferred appeal No. 25 of 1933 and the third Revision No. 106 of 1933. I do not think a second appeal lies but I am willing to treat it as a revision application.

The points taken on behalf of the creditors are as follows:-

(1) The Court had no jurisdiction at all under Sec. 37 to pass the order complained of;

(2) If it has jurisdiction to make the order it could only make it as part of the order of annulment and could not pass a subsequent order,

(3) The payment was duly made within the meaning of Sec. 37;

(4) The trial Court made no proper enquiry;

(5) Respondent having admitted the debts is estopped from disputing them.

In view of my decision on the third point I propose to deal with points (1) and (2) very briefly Section 37 does not itself authorise an order of the nature made, nor has any parallel case been quoted. In so far as such an order is based on the same grounds as the order of annulment I think the Court has inherent powers to make it. But I think such an order must be made at the same time as the order of annulment and not in any subsequent proceeding. For it might easily happen that an order of refund might be challenged on grounds which if good would make the annulment bad and yet the Court would not be able to interfere with the annulment. In fact in the present case R. S. Mithan Lal has argued that the Insolvent's title to the money was settled in the annulment proceedings and cannot be gone into now. He has quoted 1933 Patna 84 as an authority that the Court can pass orders further under Sec. 37 subsequent to an annulment order. But in that case the supplementary orders were orders for the vesting of the Insolvent's estate for which Sec. 37 specifically provides, and the case if it is correctly decided about which I have doubts may be distinguished on that ground.

I now come to the third point. "Duly made" means made in accordance with law Sec. 59 lays down that it is the duty of the Receiver to distribute the Insolvent among the creditors entitled thereto. Sec. 33 provides for the framing by the Court of a schedule of persons who have proved themselves to be creditors and of their debts. Therefore if a Receiver makes a payment towards a debt which is entered in the schedule it seems clear to me that such a payment is made according to law even though the debt is one which should

not have been entered in the schedule whether rightly or wrongly framed is resjudicate as regards payments actually made under it.

In view of my findings on points (2) and (3) it is not necessary to discuss the last two points.

I allow the applications and set aside the orders of the Courts below directing a refund. Opponent to pay costs in all Courts.

Application allowed.

Civil Revision Application No. 54 of 1933.

BEFORE MR. D R NORMAN, I.C.S.

Mohammed Hasmat Ullah son of Qudrat Ullah of Ajmer *Applicant.*

Versus

Mst. Basti Bibi w/o S. Lal Mohamed of Ajmer (2) Sher Mohamed Ahalmad Assistant Commissioner's Court, Ajmer (3) Mukhtar Mohamed Naib Vakil Sirohi State Mount Abu (4) Siraj Mohamed (5) Zahoor Mohamed sons of Lal Mohamed (6) Akhtar Mohamed c/o Mukhtar Mohamed Mount Abu and (7) Murad Bano d/o Lal Mohamed

Opposite party.

(a) Revision grounds of.—

When no reasons are given by the lower Court for its decision it is open to the High Court to go into the point even in revision

(b) Full court-fee not paid-Whether appellant has a right to be heard up to the value of the Court-fee paid:

An appellant whose prayer for time to make up deficient Court fee has been rejected ought to be heard up to the value of the Court fee paid in time.

(3) The payment was duly made within the meaning of Sec. 37;

(4) The trial Court made no proper enquiry;

(5) Respondent having admitted the debts is estopped from disputing them.

In view of my decision on the third point I propose to deal with points (1) and (2) very briefly Section 37 does not itself authorise an order of the nature made, nor has any parallel case been quoted. In so far as such an order is based on the same grounds as the order of annulment I think the Court has inherent powers to make it. But I think such an order must be made at the same time as the order of annulment and not in any subsequent proceeding. For it might easily happen that an order of refund might be challenged on grounds which if good would make the annulment bad and yet the Court would not be able to interfere with the annulment. In fact in the present case R. S. Mithan Lal has argued that the Insolvent's title to the money was settled in the annulment proceedings and cannot be gone into now. He has quoted 1933 Patna 84 as an authority that the Court can pass orders further under Sec. 37 subsequent to an annulment order. But in that case the supplementary orders were orders for the vesting of the Insolvent's estate for which Sec. 37 specifically provides, and the case if it is correctly decided about which I have doubts may be distinguished on that ground.

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not have been entered in the schedule whether rightly or wrongly framed is resjudicate as regards payments actually made under it.

In view of my findings on points (2) and (3) it is not necessary to discuss the last two points.

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Application allowed.

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Versus

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Opposite party.

(a) Revision grounds of:—

When no reasons are given by the lower Court for its decision it is open to the High Court to go into the point even in revision

(b) Full court fee not paid-Whether appellant has a right to be heard up to the value of the Court-fee paid:

An appellant whose prayer for time to make up deficient Court fee ha been rejected ought to be heard up to the value of the Court fee time.

10 I.C. 207
1926 Lah. 558 } A.I.R
1931 Lah 237 } Foll:
26 I. C. 746 Dist.

(c) Reliefs several and not separately valued-Whether appellate Court bound to hear appeal, suo moto without amendment

Where the reliefs claimed are several and are not separately valued it is not possible for a Court of appeal to hear the appeal up to the value of the Court fee paid within limitation, suo moto without an application to amend the memo of appeal.

1931 Lah 237 Doubted on this point.

(d) Point not raised in appeal but raised in review-Whether can be allowed to be raised in revision:

Where appellant wants to be allowed to argue his appeal to the extent of Court fee paid within limitation, this ought to be put forward by him as an alternative plea when the appeal is argued But when this plea was urged in review application which was rejected on a wrong view of law and not on the ground that it was not urged in appeal, it is open to the High Court to allow it to be raised in revision.

Date of Judgment. 17-7-1933.

Counsel. Mr. Abdul Rashid for the .. ... *Applicant*
Mr. Mohan Lal Capoor for ...*Opposite party.*

Subject matter of the case.

Application for revision against the order dated the 20th January 1933, passed by the Additional District Judge, Ajmer in Civil Appeal No. 166 of 1929.

Order.—This is a revision application against the decree of the learned Additional District Judge, dismissing applicant's appeal as time barred. The material facts are as follows. Applicant filed a suit claiming (1) a declaration that a certain decree was not binding on him (2) an injunction Specific performance of a contract, and in the alternative Rs. 2400/-. The suit was valued at Rs 1200/-. The trial Court in passing a decree dismissing the suit, held that the proper valuation was Rs. 2400/- and ordered applicant to pay deficit.

2 Applicant then filed an appeal in the Court of the Additional District Judge valuing it at Rs. 1200/-. At the hearing a preliminary objection was raised that it was insufficiently stamped The Court passed the following order dated 6th August 1931

"The memo of appeal is unsufficiently stamped. It should be returned to appellant as desired by him." On the memo itself the following order was endorsed.... ....

"The memo of appeal is returned to appellant as desired by him "

On 13th August 1931 applicant again presented the appeal with the deficiency in Court fees made up and with an application under Sec. 5 of the Limitation Act and Sec. 149 Civil Procedure Code. Applicant also applied in revision to this Court against the order of 6th August 1931. This latter application was dismissed on 7th January 1932. The application under the Sec 5 and Sec. 149 was dismissed on 7th August 1932 the Judge holding that Sec. 149 did not apply as applicant had made up the deficiency of his own accord, and not under the Court's orders and that no sufficient cause was shown for applying Sec. 5. Applicant then preferred a review application on the ground that he was entitled to be heard on such reliefs as were covered by the Court fees paid at the time of first presentation. This too was dismissed and applicant has again come to this Court in revision. In arguement he has confined his case to the point raised in the review application namely his right to be heard on such reliefs as fall within the original valuation.

3. Mr. Mohan Lal takes what is really a preliminary objection that this cannot be done since applicant voluntarily withdrew his appeal on the 8th June 1931: Mr. Abdul Rashid replies that he only did so as the Court intimated its view that the appeal was undervalued. This from the wording of

the Additional District Judge's order would appear to be correct. Mr. Mohan Lal refers to the previous order of this Court in the matter. Jolly J. C. remarked therein that the memo of appeal appeared to have deen returned to appellant at his own request, and held that there was no case decided since the Court had not passed any order either accepting or rejecting the appeal memo. I do not see how this order affects the present point.

4. Appellant certainly took a wrong course. His proper course on the preliminary objection being up held was either to pay the extra fee or ask the Court to allow him to amend the memo to bring the reliefs within the Court fee paid. If he had wanted time to consider which course he should follow, he could have asked for it meanwhile leaving the memo in Court. Instead of this he asked for the memo back and the question is does this amount to a withdrawal? To hold that it does would in my judgment be taking too technical a view. Applicant certainly did not intend to withdraw the appeal as his subsequent conduct shows. Moreover when an admitted appeal is withdrawn should follow containing an order or costs. From the fact that no costs were asked for or given I infer that opponents also did not understand that the appeal was withdrawn. If the appeal had been withdrawn the fresh presentation would have been a new appeal and must have been numbered as such. I hold therefore that the return of the appeal memo did not amount to a withdrawal of the appeal and over-rule Mr. Mohan Lal's objection.

5. On the merits there are really two points for decision.

(1) Whether applicant has the right to have his appeal heard up to the amount of the Court fee paid within the period of limitation.

(2) Whether applicant not having raised this point in the lower appellate Court can raise it now in revision.

6. The first point was dealt with by the Additional District Judge in his order on review. He decided it in the negative but as he gives no reasons for his decision except the standing practice of his Court I think it is open to me to go into the point even in revision. Now all the authorities to which I have been referred viz. *Duni Chand vs. Aziz Khan* (10 I.C. 207) *Firm Nihal Chand Atma Ram vs. Sardari Mal* (1926 Lah. 558) and *Shah Mohammad vs. Syed Shah Mohammed* (1931 Lahore 558) and *Shah Mohammed vs Syed Shah Mohammed* (1931 Lahore 237) take the view that an appellant whose prayer for time to make up deficient Court fee has been rejected ought to be heard up to the value of the Court fee paid in time In *Valli Ise Amanji vs. Mohmad Adam Admal* (26 I. C. 746) the prayer that the suit should be heard up to the Court fee paid was raised not in suit but in appeal, so this is not really an authority to the contrary. On the first point therefore I decide in favour of applicant.

7. The second point is more difficult, in *Shah Mohammed vs Syed Shah Mohammad* it was held that a Court of appeal is bound to hear an appeal up to the value of the Court fee paid within limitation whether it is asked to do so or not. This case however is not reported in the I. L. R. series and as no reasons are given for the decision it is not really an authority at all. Moreover there the suit was for the preemption and appellant sought a reduction of the amount which he was ordered to pay. That is to say the relief sought in appeal was single. But here several reliefs were claimed both in the original suit and in appeal and those reliefs were not separately valued. In order to bring the appeal within the original valuation it would be necessary to strike out one or more of the reliefs claimed I do not see how the Additional District Judge could do this *suo-motu* without an application to amend. So even if Shah Mohammed vs. Syed Shah Mohamed were rightly decided, a point on which I express no opinion it has no application here.

8. The next question is whether applicant is saved by having raised the point in his review application. It ought of course to have been put forward as an alternative plea when the appeal was argued. But when the review application was rejected not on this ground but on a view of the law which I have held to be wrong I am inclined to give applicant a final chance.

9. I allow the application, set aside the decree of the lower appellate Court and remand the appeal to the lower appellate Court for hearing after giving applicant an opportunity to amend his memo of appeal so as to bring it within the original valuation of Rs. 1200/-. But as appellant did not raise the point on which he has succeeded at the proper time he must pay opponent's costs in this application.

Case remanded.

Miscellaneous Civil Revision No. 61 of 1933.

BEFORE MR. D. R. NORMAN. I. C. S.

Badshah Begum wife of Nazeer Ali, Mohalla Safed Bafan, Diggi, Ajmer .... *Applicant.*

Versus.

Mr. Permatama Swarup Advocate, Ajmer Receiver of the Estate of Nazeer Ali, Insolvent (2) Amar Chand Sugan Chand (3) Chand Mal Raj Mal (4) Madan Chand Poonam Chand (5) Khaju Lal Miru Lal (6) Inder Chand (7) Hazari Mal Jodh Raj (8) Kishen Lal Chitar Mal (9) Kalyan Mal and (10) Madan Lal son of Khaju Lal Mahajan of Ajmer.

Opposite Party.

S 75 (1) Insolvency Act—Person aggrieved—meaning of—On matters of Procedure only—whether appeal lies.

A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something.

A person cannot be said to be aggrieved by a legal error in procedure only which does not affect his substantive rights

Date of Judgment: 17-7-1933.

Counsel. Mr. Anandi Prasad for the ... ... *Applicant.*

Messrs. Mohan Lal Capoor and B. D. Khanna for the *Opposite party.*

Subject matter of the case.

Application for revision under Sec. 75 of the Provincial Insolvency Act against the order dated the 8th March 1933, passed by the Additional District Judge, Ajmer in Misce: Appeal No. 33 of 1933.

Judgment.—In insolvency proceedings the Insolvency Judge elected to treat the Receiver's report as a petition against the applicant under Secs 53 or 54 of the Insolvency Act, and directed applicant to lead evidence. Applicant appealed on the ground that the burden of proof was on the Receiver. The Additional District Judge dismissed the appeal on the ground that the applicant was not a person aggrieved within the meaning of Sec. 75 (1) of the Insolvency Act as the order did not deprive her of anything to which she was legally entitled.

I agree with the learned Additional District Judge. The expression "person" aggrieved is taken from English law. In "Ex-parte Sidebotham" quoted in para 817 of Mulla's law of Insolvency James L. J explained the phrase as follows:—

"A person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

Now applicant had a legal grievance in the sense that his grounds of appeal were that there had been a breach of the law of procedure. But it cannot be said that he has been wrongfully deprived of anything or wrongfully refused any thing or that his title to anything has been wrongfully affected. It is true that a legal error in procedure may result in any of these things. If so applicant can make that error a ground of appeal. But until there is an order which affects applicant's substantive right I do not think that he is a person aggrieved within the meaning of above quoted definition. It is moreover obvious that if a more extended meaning were given to "a person aggrieved" and appeal were allowed against orders dealing with matters of procedure only, an obstinate litigant could prolong proceedings almost indefinitely, since even a order disallowing a question to a witness could be made the subject of an appeal.

I would add that the question whether the trial Court's order that applicant should lead evidence is right or wrong was not specifically raised in this application and was not argued before me.

The application is rejeceted with costs.

Application rejected.

Criminal Revision No. 3 of 1933.
(Railway Jurisdiction)

BEFORE MR. D.R. NORMAN, I.C.S

Jagat Ram son of Bhairon Singh Guard B. B. & C. I. Railway, Bandikui .. .. *Accused-Applicant.*

Versus.

Crown .... *Opposite party.*

(a) Criminal Revision-Whether applicant has a right to be heard

In Criminal revisions an applicant has no legal right to be heard in support to his application.

(b) Complaint under section 193 I.P.C. Whether conviction under section 471 I.P.C. is bad:

The essence of a complaint is the facts set out in it. The mention of a wrong section does not invalidate a private complaint and there is no reason why a different rule be applied to a complaint filed by an officer of Government. A conviction under S 471 I P.C. on a complaint under S 193 I P. C. is not bad if the conviction is based on the facts set out in the complaint.

4 Rangon 131

1 Lucknow 523 Dist

Date of Judgment 21-7-1933.

Counsel K B. Abdul Wahid Khan
Public Prosecutor for the Crown.

Subject matter of the case.

Application for revision against the Judgment dated the 19th June 1933 passed by the Political Agent, Eastern Rajputana States and District Magistrate and Sessions Judge, Railway Jurisdiction in Criminal Appeal No. 72/33 of 1933.

Judgment.—Applicant instituted a suit on a pronote in the Court of the District Judge exercising Railway Jurisdiction in Western Rajputana. The suit failed and the District Judge acting under Sec. 476 Criminal Procedure Code filed a complaint against him in the Court of the Railway Magistrate. The complaint alleged that applicant had forged the signatures on the pronote and had supported the forgery by a false statement on oath, thereby fabricating false evidence, an offence punishable under Sec. 193 I. P. C. An appeal against this order was dismissed by my predecessor.

At the trial the Magistrate framed charges under Secs. 193 and 471 I P C. He found that applicant had fabricated false evidence and had used a forged document knowing it to be forged and could therefore be convicted under either Sec. 193 I. P. C. or Sec. 471 I P. C. He concluded the judgment as follows :—

"I accordingly find the accused guilty and convict him preferably under Section 471 I. P. C. and sentence him to undergo three months rigorous imprisonment and Rs. 500/- fine or in default three months rigorous imprisonment more."

An appeal preferred by applicant was heard by the Sessions Judge exercising Railway jurisdiction in Eastern Rajputana and was dismissed. Applicant has now come in revision.

On the admisson of the application applicant was allowed bail. Notice of the hearing was issued, but as applicant had left his house at Bandikui and his whereabouts were not known it was returned unserved Applicant has no legal right to be heard in support of his application. As failure to service notice on him due to his own default I did not consider it necessary to adjourn the hearing.

The points taken in the application are as follows :—

(1) The Magistrate examined Mr. Hardless a prosecution witness after the defence case was closed. (paras 2 and 3).

(2) There was no proper complaint. (para 7).

(3) The complaint being of an offence under Section 193 I. P. C. and not under Sce. 471 I. P. C. the conviction is bad (para 8).

(4) The prosecution was conducted by private counsel. (para 10)

(5) The conviction is bad on its merits. (paras 1,5,6, 9).

Point No. 1.

Mr. Hardless was examined as a Court witness. There is nothing in law to prevent a Court examining as a Court witness a person produced by either party if the Court thinks fit. In this case the defence had examined two Handwriting Experts and there was therefore some ground for allowing the other side's Expert to be examined as a Court witness. Moreover although the evidence of Mr. Hardless doubtless weakened the effect of the evidence of the defence Experts in the Magistrate's mind the conviction is not based on his evidence.

Point No. 2.

This is merely a technical objection to the form of the order under Sec. 476. I do not consider it valid, and moreover it cannot be taken now since an appeal against the order was rejected by my predecessor.

Point No 3

This is the most important ground I do not think it is valid. Applicant was convicted on the facts set out in the complaint. The essence of a complaint is the facts set out. The mention of a wrong section does not invalidate a private complaint and I do not see why there should be a different rule when a complaint is filed by an officer of Government. In *U Nyam Nein Da vs. King Emperor* (4 Rangon. 131) in

which it was held that the complaint being of an offence under Sec. 121-A the accused could not be convicted under Sec. 124-A the facts on which the accused was convicted were not set out in the complaint. Duckworth J. remarked:—

"If the case has been that the Local Government, in initiating the prosecution, had stated that, before conspiring to wage war, or whilst doing so, these persons had made seditious speeches about the country, then I consider that the Court might have been justified in charging them under Sec. 124-A, even though the only section actually mentioned by the Local Government had been Sec. 121-A. I. P. C."

In *Ram Samujh vs. King Emperor* (I Lucknow 523) the complaint was of using as genuine a forged document and accused was convicted of forgery which was never alleged in the complaint.

Further a wrong section was not specified in the complaint. As pointed out by the learned Magistrate appliant could just as well have been convicted under Sec. 193 I. P. C. and if I thought it necessary I could alter the conviction to one under that section.

Point No. 4.

The Magistrate has discretion under Section 495 Criminal Procedure Code to allow the prosecution to be conducted by someone other than the Prosecutor

Point No 5.

The ordinary rule is that In revisions this Court will not go into the merits of the case I have read the judgments of both the Courts and see no reason to depart from this rule. Applicant was convicted, not on expert evidence of Mr. Hardless, but on strong extrinsic evidence. The learned Sessions Judge has considered in his judgment all the points which could be urged in favour of the applicant.

The application is rejected. The applicant's bail is cancelled and he should be re-arrested and committed to jail to serve out the remainder of his sentence.

Application dismissed.

Small Cause Court Revision Application No. 76 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

Panchu Lal adopted son of Chand Mal Mahajan Saraogi of Kishengarh .... *Applicant.*

Versus.

Manmohan Lal son of Magan Lal (2) Praveen Chander son of Chaggan Lal proprietors of the Firm Magan Lal Praveen Chander of Kekri .... *Plaintiffs.* and (3) Inder Chand son of Mangi Lal Mahajan Saraogi of Madanganj, Kishengarh .... *Opposite Party.*

(a) **Acknowledgment by one co-partner or co-contractor-authority to bind others-whether can be inferred :**

The authority of one partner to sign acknowledgments so as to bind other partners may be inferred from circumstances. The same principle applies to co-contractors.

41 Madras 247

3 Rangoon 367 Foll.

(b) **Plaint vague—defendant not getting it cleared up-whether plea can be taken in revision :**

A plaintiff should not be allowed to set up a case at variance with the plaint but when a plaint is ambiguous and the defendant take no steps to get the ambiguity cleared up, the defendant should not be permitted in revision to set up that ambiguity. A wide discretion in such a case must be allowed to the trial Judge to decide what points he should and what point he should not allow to be argued before him.

Date of Judgment : *21-7-1933.*

Counsel : Mr. Raghu Nath for the applicant.

Mr. Mohan Lal Capoor for the opposite party.

Subject matter of the case.

Application for revision under Sec. 25 of the Provincial Small Cause Courts Act IX of 1887 against the Judgment dated the 30th November 1932, passed by the Judge Small Cause Court, Kekri in suit No. 613 of 1932.

Judgment,—This application arises out of a suit filed on a khata. The khata was in the name of Inder Chand-Panchu Lal but was signed by Inder Chand (D. 1) only. But the trial Court held that Panchu Lal (D. 2) was also liable, as the signature of one partner would bind the other. The present application is filed by Panchu Lal.

That the authority of one partner to sign acknowledgments so as to bind other partner may be inferred from circumstances is settled law (vide 41 Madras 247 and 2 Rangoon 367). Mr. Raghu Nath for Panchu Lal argues that Panchu Lal was not used as the partner of Inder Chand. The plaint (para 4) says that Panchu Lal is liable as the transactions which give rise to the Khata were done by Panchu Lal and Inder Chand jointly. This is not as plain as it should have been. It was however open to Panchu Lal to ask that the exact nature of his liability should be made plain. While I hold strongly that a plaintiff should not be allowed to set up a case at variance with the plaint I also hold that when a plaint is ambiguous and the defendant takes no steps to get the ambiguity cleared up, the defendant should not be permitted in revision to set up that ambiguity. That is to say when pleadings are vague a wide discretion must be allowed to the trial Judge to decide what points he should and what points he should not allow to be argued before him.

There is ample evidence that the transactions out of which the khata arose were between plaintiffs on the one hand and the two defendants on the other. Nor I am prepared to say that there were not circumstances from which both a partnership and the authority of one partner to bind the other by his signature could be inferred.

Further even if it be held that defendants were sued as co-contractors the ruling in 41 Madras 427 applies to co-contractors as well as to partners.

The application is dismissed with costs in favour of respondents 1 and 2 (one set).

Application dismissed.

Short Notes of Important Judgments.

1. (*a*) **Interest.**—When to be awarded:

Interest can only be awarded when there is an agreement for it-express or implied-or when it is payable under some law such as the Interest Act.

(*b*) Instalments when to be awarded-Future interest on instalments.

Instalments should not be awarded unless some evidence is led of the defendant's condition. When instalments are allowed it is equitable to allow future interest.

S.C.C. Revision Application No. 38 of 1933.

Kanhiya Lal of Kharwa Versus Hunja of Sarniya.

Date of Judgment: 19-6-1933.

2. Dhobi-whether artisan or labourer. Application of article 7 or 102 of the Limitation Act to his suit for work done:

A dhobi is not an artisan or a labourer and a suit by him for services rendered is governed by article 102 and not article 7 of the Limitation Act. In absence of agreement a Dhobi is entitled to reasonable remuneration for his services.

S.C.C. Revision Application No. 24 of 1933.

S. Tajamul Husain of Ajmer Versus Mohamed Bux Dhobi of Ajmer.

Date of Judgment: 19-6

3. O. 16 C.P.C. Applicability of to witnesses residing outside British India-Procedure on non-attendance:

The provisions of O. 16 are not confined to witnesses residing in British India. The right to have a witness summoned is an absolute one and a Court cannot refuse to issue summons to witnesses residing outside British India. A Court no doubt cannot compel the attendance of such witnesses and if such witnesses do not appear and the party requiring them does not ask for a commission a court will be justified in proceeding without them.

Civil Second Appeal No. 47 of 1932.

Mr. Magan Lal of Ajmer Versus Seths Johri Lal and Panna Lal of Ajmer.

Date of Judgment· 22-6-1933.

4. (*a*) **Indentification of accused-rule about—**

When an accused person is not known or is very alightly known to witnesses his indentification as the offender must be absolutely certain. The mere fact that at the parade the accused was allowed to put on coat and cap of an unusal pattern is no ground for failure to identify him if the witnesses had observed the accused sufficiently well

(*b*) Use of statement under section 288 Cr P C.

If evidence is to be used under section 288 Cr.P.C. a note should be made on the record at the time it is admitted.

Criminal appeal No 7 of 1933 and Criminal Reference No. 33 of 1933.

Bhanwar Lal Alias Suraj Karan Brahmin of Ajmer. Versus Crown.

Date of Judgment: 24-6-1933.

5. In matrimonial matters—Value to be attached to the statement of parties

It is well recognised law that in matrimonial matters the statements of parties require corroboration.

45 Madras 982. Relied upon.

Miscellaneous Civil Petition No. 20 of 1933.

Mrs. Elizabeth Gardner of Ajmer Versus Mr. Stuart Gardner of Abu Road.

Date of Judgment: 3-7-1933.

6. Non-payment of Court-fees before decree-Whether can be recovered by attachment subsequently.

Where after the passing of a decree it is found that the plaint was improperly stamped, there is no provision of law which entitles a Court to recover it by attachment of plaintiff's immoveable property.

Civil Revision Application No. 51 of 1933

Chagan Lal of Mehrun and Dhani Ram of Sadara Versus Chagan Lal of Dhomdari and Dhani Ram of Sadara.

Date of Judgment: 3-7-1933.

7. Interest payable on default from date of bond—whether penal · Even if penal—When to be allowed:

In so far as interest is to run from the date of the bond and not from the date of default it is penal. But there is no law which forbids allowing of such interest Unless relief can be granted under some statute such as the Usurious Loans Act or Section 33 of Ajmer Laws Regulation, parties must be held to the terms of their contract.

S.C.C. Revision Application No. 62 of 1933.

Firm Moti Lal Nand Lal of Jalia Versus. Kela and Raman Malies of Jalia.

Date of Judgment: 4-7-1933.

8. Section 70 of the Contract Act. Applicability of to fees of medical practitioners.

It is not usual for a doctor to stipulate for his fees in advance. Under section 70 of the Contract Act he would be entitled to a reasonable fees for his services unless they were intended to be gratuitous.

Civil Revision Application No. 46 of 1933.

Doctor J. M. Roy of Ajmer Versus Mr. N. K. Ghosh of Ajmer.

Date of Judgment : 5-7-33.

9. Suit filed on basis of exclusive ownership. Whether plaintiff can get relief on proof of joint ownership.

The general proposition of law is that where a major relief is claimed a minor relief can if proved be granted, consquently a plaintiff suing on sole ownership can succeed on proof of joint ownership.

1928 Lahore 429. Relied upon.

Civil Second Appeal No. 15 of 1933.

Beni Gopal of Ajmer Versus Seth Kanhiya Lal of Ajmer.

Date of Judgment : 10-7-1933.

10. Leave for appeal to Privy Council in suits which cannot be valued. Section 109 (*c*) C P. C.

When a suit cannot be valued in money a certificate for leave to appeal to Privy Council can be granted only under section 109 (*c*) of the C. P. C.

23 All : 227 (231) P. C.

48 I. A. 31. Relied upon.

Ganga Dhar of Ajmer Versus Beni Gopal of Ajmer.

Date of Judgment: 21-7-[illegible]

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AJMER.

Small Cause Court Revision Application No. 89 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

Abdul Ghani son of Master Khuda Bux of Ajmer.
Plaintiff-Applicant.

Versus.

Akber Khan son of Guman Khan of Khanpura District Ajmer .... . *Defendant, Opposite-Party.*

(a) Bond payable by instalments Limitation Act article 75, application of !

When a bond is payable by instalments the ordinary rule is that limitation runs from default. Limitation is to be decided on the claim as set out in the plaint and not on a claim which might have been made.

(b) Amendment of plaint in such cases when refused.

When a plaintiff has once relied on the default clause he cannot afterwards be allowed to amend his plaint so as to waive it

Date of Judgment —9 10-1933

Counsel —Mr. Jasodha Nandan for the *Applicant.*
R. S. Mithan Lal for the *Opposite party.*

Subject matter of the case.

Application for revision filed on 1st July 1933, of the order dated the 7th April 1933 passed by the Judge Small Causes Court, Ajmer in suit No. 751 of 1933

Judgement.—Applicant sued on an instalment bond containing a clause that in default of payment of one instalment plaintiff would be at liberty to recover the whole amount. The suit was filed more than three years after the date of th

first default. Applicant claimed that his suit was in time except as regards one instalment as he could and had waived the default. The trial Court looking to the fact that applicant had claimed the whole amount of the bond, which included an instalment not due at the date of the suit, held that applicant had elected to enforce the default clause and that the suit was time barred.

I agree with the trial Court. The ordinary rule is that time runs from the default. Art. 75 of the Limitation Act runs as follows:—

On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years.	When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.

The ordinary rule therefore is that the time runs from the date of default and if plaintiff wishes to take advantage of the exception he must make this clear. Leaving aside the question whether mere forbearance to sue amounts to waiver, the present plaint in my judgment shows that plaintiff had not waived his rights under the default clause. The plaint does not merely claim an instalment which is not due, but states that plaintiff has made frequent demands for all the instalments including the one not due. Limitation must be decided on the claim as set out in the plaint and not on a claim which might have been, but was not actual made. Nor when the plaintiff has once relied on the default clause can he afterwards amend his plaint so as to waive it. It may be hard that plaintiff should lose his money but the law of Limitation always bears hardly on negligent persons.

The application is dismissed with costs.

Application dismissed.

Small Cause Court Revision Application No. 110 of 1933.

BEFORE MR. D R. NORMAN, I. C. S.

Beni Gopal son of Brij Mohan Agarwal of Ajmer
Applicant.

Versus

Abdul Rahman son of Chand Khan Musalman of Ajmer.
Opposite Party.

Qabuliyat coupled with possession—whether can form basis of rent suit ?

A Qabuliyat signed by the tenant amounts to an agreement to lease and coupled with transfer of possession gives a cause of action for a rent suit

Date of Judgment —9-10-1933.

Subject matter of the case.

Application for revision under Sec 25 of the Small Cause Courts Act IX of 1887 against the judgment dated the 15th April 1933, passed by the Judge Small Cause Court. Ajmer in suit No. 3550 of 1933.

Order.—Applicant filed a suit against opponent to recover (a) money due on a pronote, (b) rent of a house in respect of which opponent had executed a Qabuliyat. The trial Court decreed the suit as regards the pronote but dismissed it as regards rent on the ground that the Qabuliyat not being signed by both parties did not amount to a lease. Against this latter order applicant has come in revision.

Although a lease requires the signatures of both parties a Qabuliyat signed by the tenant amounts to an agreement to lease and coupled with transfer of possession gives a cause of

I therefore hold that the word "debts" in Section 10 (1) (a) includes secured debts.

Finally it is argued that money secured by a usufructuary mortgage cannot be a debt at-all. If the mortgage deed does not give the creditor any right to proceed personally against the debtor this is probably correct. But this point can only be decided by reference to the actual mortgage deeds. The creditors failed to produce these when the petition was heard and I decline in revision to allow the case to be re-opened from the beginning.

The application is dimissed with costs in favour of the Insolvent (Opponent No. 1)

Application dismissed.

Civil Revision Application No. 130 of 1933.

BEFORE MR D. R. NORMAN, I. C. S.

Mst. Chaibri Bai wife of Badri Lal Kayastha of Ajmer. *Applicant.*

Versus

Haji Noor Mohamed son of Wali Mohamed Chowk Pannigaran, Ajmer (2) Urban Co-operative Bank Limited, Ajmer through the Manager (3) M. Mithan Lal retired overseer, Court of Wards, Ajmer (4) M. Bal Kishen Manager Mehrun State (5) Bhawani Bai wife of Mukat Behari Lal Purani Mandi, Ajmer .... *Opposite Party.*

(a) On questions of Court fees whether Revision lies.

On questions of Court fees a Revision Application does lie.

55 All : 274 Foll.

(b) Plaint How to be stamped !

A plaint should be stamped on the allegations contained in it and not on the allegations of the defendant.

(c) Suit under O 21, R 103 C. P. C. How to be stamped when possession claimed.

When possession is claimed in a suit under O 21. R 103, C. P. C. which is based upon title the proper Court fee payable is Rs. 10/-

5 A. M. L. J. 61. Foll

Counsel.--Mr. Kishan Lal for the ... *Applicant.*

Messrs. Parmatma Swaroop and Shyam Swaroop for the . . *Opposite Party.*

Date of Judgment 13-10-1933.

Subject matter of the case.

Application for revision under Section 115 of the Code of Civil Procedure against the order dated 26th July 1933, passed by the Sub Judge, First Class, Ajmer in Civil Suit No nilof 1933.

Judgment.—Opponent No 1 purchased certain property at a Court auction. When he came to take possession he was obstructed by the applicant. He applied to the Court under O. 21 R. 97 and succeeded. Applicant then brought a suit under O. 21 R 103 paying Rs. 20/- Court Fees i.e. Rs. 10/- for a declaration and Rs 10/- for an injunction. Opponent No. 1 claimed that he had obtained possession and that applicant must ask for possession and pay Court fees thereon. The Judge upheld this contention and applicant has come in revision.

2. A preliminary objection is taken that on questions of Court fees a revision application does not lie. The latest authority *Lakshmi Narain Rai* VS *Dip Narain Rai* (55 All.

274) is that it does lie. With that ruling I respectfully agree. On the merits the application must succeed. In the first place a plaint should be stamped on the allegations contained in it and not on the allegations of the defendant. In the second place there is the authority of this Court that when possession is claimed in a suit under R. 103 based upon title the proper Court fee payable is Rs. 10/- vide *Chaturbhuj VS Ram Kishendas* (5 A. M. L. J. part II P. 61). This ruling was published in June and should have been known to counsel, though in fairness to the Judge I must add that unfortunately my office did not distribute the volume in which it occurs to the Subordinate Courts until August by which time the Sub Judge had pronounced his order.

3. I allow the application set aside the order of the trial Court and direct the suit to proceed on the Court fee paid. Opponent No. 1 to pay applicant's costs.

Application Allowed.

Civil Revision Application No. 169 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

Syed Fayaz Husain (2) Niaz Husain (3) Mohamed Hanif (4) Fakhruddin (5) Tajummal Husain (6) Nur Mohamed khadims of Durgah Piran Pir on their own behalf and as representatives of the entire khadims of Durgah Piran Pir.

Applicants.

Versus

Mir Mahmood Ali Mutwalli of Durgah Piran Pir.

Opposite Party.

District Judge and Additional District Judge whether form a single Court.

Once an appeal is transferred to the Additional District Judge he is for purposes of that appeal constituted the court of the District Judge. It follows that the District Judge ceases as regards that appeal to be the Court of the District Judge, and has therefore no jurisdiction to pass any orders therein, unless and until he exercises his powers under section 20 of the Courts Regulation to withdraw that appeal from the Additional District Judge.

Counsel.—Mr. Daya Shanker for the ... ... *Applicant.*

Mr. Abdul Qadir Beg for the ... *Opposite Party.*

Date of Judgment 11-11-1933.

Subject matter of the case.

Application for revision against the order dated the 23rd October 1933, passed by the District Judge, Ajmer.

Judgment.—This revision application arises out of a suit filed by the Khadims against the Mutwalli of the Durgah Piran Pir as regards offerings Pending disposal of the suit the trial Court appointed a Receiver to collect the offerings. Against this order the plaintiffs appealed and the appeal was under the standing orders of the District Judge referred for disposal to the Additional District Judge The Additional District Judge admitted the appeal and passed an ad-iterim order suspending the trial Court's order. This was on 21st October and the next day the Additional District Judge went on short leave. The Mutwalli being aggrieved by the ad-iterim order applied to the District Judge on 23rd October to have it set aside. The District Judge obtained the record from the Additional District Judge's office and suspended the order. The grounds of this revision are that the District Judge having referred the appeal to the Additional District Judge had no jurisdiction to pass any order. As the Additional District Judge has fixed 7th November for the hearing of the appeal, and that date has now passed this application is of academic interest only, but as it raises an important question of jurisdiction I propose to decide it. On behalf of opponent it is argued that the District Judge and

Additional District Judge form a single Court, and though for convenience the hearing of appeal is divided between them, yet either can pass orders in any appeal in the absence of the other.

2. In my judgment the application must be allowed. Sec. 6 of Regulation IX of 1926 empowers the Chief Commissioner, to appoint any person to be Additional District Judge and to exercise such powers of the District Judge, as the Chief Commissioner may direct. It further provides that as regards the exercise of those powers the Additional District Judge shall be deemed to be the Court of the District Judge. By Notification No. 623 C. C. dated 27th March 1914 passed under the corresponding Section of Regulation I of 1877 namely Sec. 4-B the Chief Commissioner empowered the Additional District Judge to exercise all the powers of the Court of the Commissioner (District Judge) and to decide all appeals referred to him by the Commissioner. That is to say once an appeal is transferred to the Additional District Judge he is for the purposes of that appeal the Court of the District Judge. It follows that the District Judge, when he transfers an appeal, ceases as regards that appeal to be the Court of the District Judge, and has therefore no jurisdiction to pass any orders therein, unless and until he exercises his powers under Sec. 20 to withdraw the suit from the Additional District Judge.

3. I therefore allow the application and set aside the order of the District Judge, but in all the circumstances make no order as to costs.

Application allowed.

Criminal Revision Application No. 54 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

Mr. A Pooler of Srinagar Road, Ajmer .... *Applicant.*

Versus

Gafur son of Nabi Bux Tongawala, Hathi Bhata, Ajmer. *Opposite Party.*

(a) Prosecution under section 427 I P.C. Conviction under section 279 I.P.C, Whether legal.

When a man is charged with one offence and without altering the charge is convicted of another offence, different in kind the conviction is bad 'in law'. Section 537 of the Cr. P. C. cannot cure such a defect.

(b) Section 367 Cr. P. Code Meaning of.

Section 367 of Criminal Procedure Code directs that the judgment shall contain the reasons for the decision.

Disregard of its provisions makes a judgment bad in law.

Counsel.—Mr. B. D. Khanna, for the ... *Applicant.*
K. B. Abdul Wahid Khan for the Crown.

Date of judgment 7-11-33.

Subject matter of the case.

Application for revision under Sec. 439 Criminal Procedure Code against the order dated the 4th October 1933 passed by the Assistant Commissioner, Ajmer in Criminal Appeal No. 37 of 1933.

Judgment.—Applicant was convicted under Section 279 I. P. C. of driving a motor car to the public danger and was sentenced by "A" Bench of the Honorary Magistrates to p

a fine of Rs. 250/-. On appeal the learned Assistant Commissioner confirmed the conviction but reduced the fine to Rs 200/-. Applicant has now come in revision.

The facts briefly are that applicant's car collided with a tonga and injured the horse so badly that it had to be destroyed. The Police refused to take up the case but the owner of the tonga instituted a prosecution for mischief under Sec 427 I. P. C. Applicant was actually charged under this section, but was convicted as already said under Sec. 279. The charge was not altered prior to the conviction.

The main ground of the application is that it was illegal to convict under Sec. 279 upon a charge under Sec. 427.

The Public Prosecutor does not support the conviction.

The Magistrates presumably thought they were acting under Sec 238 Criminal Procedure Code But mischief and driving to the public danger are not a major and minor offence respectively but entirely different offences. The learned Assistant Commissioner realised this but thought that the defect was curable under Sec. 537 Criminal Procedure Code. But Sec. 537 cannot cure every defect and the general tenor of decided cases is that when a man is charged with one offence and convicted of an offence different in kind the conviction is bad; see Sohoni's Criminal Procedure Code (13th edition) at pages 1156 and 1157. The reason is that the accused may omit to bring evidence which would be irrelevant in answer to the one charge but highly relevant in answer to the other. In the present case no defence evidence was necessary at all to answer a charge of mischief, since intention is an essential ingredient of mischief and it was not suggested by the prosecution evidence that applicant deliberately collided with the tonga.

The conviction must therefore be set aside. The next question is whether I should order a re-trial. I do not think

this necessary. Applicant has already been put to considerable expense by this prosecution. The collision took place nearly a year ago. No plan of the accident was drawn nor any measurements taken and the Court would have to rely solely on the statements of witnesses. It would I think hardly be possible for the witnesses to remember the circumstances with sufficient clearness for the blame to be apportioned.

In conclusion it is necessary to make some remarks on the learned Assistant Commissioner's judgment in appeal. His observation on the merits of the case, as distinct from the legal issues are contained in a single sentence. "The prosecution had a very clear case which contained no major discrepancies and the defence were not able to refute it." Section 367 Criminal Procedure Code directs that the judgment shall contain the reasons for the decision. The single sentence quoted could hardly even in the simplest case, be held to be a compliance with that direction. Had the conviction been otherwise legally sustainable I should have set it aside and directed the learned Assistant Commissioner to re-hear the appeal and write a legal judgment.

I set aside the conviction and sentences and acquit the applicant. The fine if paid must be refunded.

Application allowed.

Civil Review Application No. 60 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

The B. B. & C. I. Railway Company through its Agent at Bombay .... *Applica*

Versus

The Edward Mills Company Limited Beawar through its Managing Director Rai Sahib Kanwar Moti Lal.

Opposite Party.

(1) Deficiency of Court-fee on appeal-whether appellant has absolute right to be heard up to the value of Court fee paid:

It is always open to a plaintiff or an appellant to reduce his claim and effect a saving of court fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final and the appeal is limited to the amount in contest on which alone court fee need be paid. It is for the court in each case to determine whether the reduction is otherwise permissible.

30	I.C.	379	
62	I.C.	36	Dist
1929	All	308	Foll

View in Civil Revision No. 54 of 1933 (Mohamed Hasmatullah vs. Mst. Basti-Bibi) Modified.

(2) Is appellate court bound suo motu to hear such appeal:

An appellate court is not bound suo motu to hear an appeal upto the value on which the court fee is paid. It is for the parties to put their case before the court and it is not open to a party who failed to claim a relief to say that it was the court's business to give it to him without being asked to do so.

1931 Lahore 237 Dissented from.

(3) Whether review lies on point not raised at the hearing:

The general rule is that a Court will not allow a review on a point not raised at the hearing of the case.

Civil Revision No. 201 of 1932.

(Ibrahim Khan. vs. Hazrat Noor Khan.) Foll

Counsel,—Mr. K. S. Mathur for the ... ... *Applicant.*

Mr. Daya Shanker for the ... ... *Opposite Party*

Date of judgmet 25-9-33.

Subject matter of the case:

Application for review against the order dated the 23rd January 1933, passed by the Judicial Commissioner, Ajmer-Merwara, in Civil Revision No. 12 of 1933.

Judgment.—The facts material to this application for a review are as follows:—

2. Opponent obtained a decree for damages against applicant Applicant filed an appeal in the court of the Additional District Judge which he correctly valued but stamped insufficiently. The correct court fee was later paid but the Additional District Judge dismissed the appeal as time barred. Proceedings being governed by Regulation I of 1877 applicant had no right of second appeal but he came to this Court in revision and again failed. He now seeks for a review of this last order on the ground that his appeal should have been heard by the Additional District Judge upto the value of the stamp paid This point was taken neither in the Additional District Judge's court nor in this court when the revision application was argued.

3. In *Mohammed Hasmatullah* Vs. *Mst. Basti Bibi etc.* (Civil Revision No. 54 of 1933) I held that an appellant whose prayer for time to make up a deficiency has been rejected ought to be heard up to the value of the court fee paid in time. Mr. Daya Shanker for opponent suggests that this decision is wrong and cites two cases *Surendra Narain Singha* Vs *Hafijur Rahman* (30 I.C. 379) and *Harbans Sahu* Vs. *Lalmoni Kue* (62 I.C. 36) Both those cases depend on special facts. But I am inclined to think that in *Mohammed Hasmatullah* Vs. *Mst. Basti Bibi etc.* I have stated the law rather too broadly. To reduce the valuation of an appeal involves the amendment of the memo, and in some cases it may not be possible legally to amend the memo. For instance if plaintiff sues for an injunction and values hi

relief at Rs. 200/- and fails he cannot on appeal reduce the valuation to Rs. 100/- but must pay stamp duty on Rs. 200/- or fail entirely. I think the correct statement of the law is to be found in the head note to *Shah Ramchand* Vs. *Panna Lal* (1929 All. 308) which runs.

"It is always open to plaintiff or an appellant to reduce his claim and effect a saving of court Fee if otherwise permissible. In so far as he submits to the decree appeal is limited to the amount in contest on which alone court-fee need be paid."

It is for the Court in each case to determine whether the reduction is "otherwise permissible".

4. In the present case however it is unnecessary to determine whether the reduction is otherwise permissible. If applicant wished to reduce his claim he should have taken the point in the appellate Court or at any rate in this Court when the revision application was originally argued. It was held in *Shah Mohammed* Vs *Syed shah Mohammed* (1931 Lah. 237) that an appellate Court was bound *suo motu* to hear an appeal upto the value on which the Court fee was paid. No reasons are given for this dictum, and with all due respect I am unable to accept it. The general principle of law is that it is for parties to put their case before the Court, and though it is always permissible for the Court to point out to a party his proper course of action, I do not think it is open to a party who failed to claim a relief to say later that it was the Court's business to give it to him without being asked to do so. Moreover a reduction may sometimes have to be effected by striking out one out of several reliefs claimed and the Court cannot itself assume which relief a party would prefer to strike out.

5. Further assuming that it was open to applicant to take the point for the fiirst time in revision, it is certainly not

open to him to take it in review. The general rule is that a Court will not take in review a point not raised at the hearing of the case. *Ibrahim Khan* Vs. *Hazrat Noor Khan* (Civil Revision No. 201 of 1932). There must be a limit to the extent to which the Court will condone the negligence of parties.

Review Application dismissed.

Civil Second Appeal No. 27 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

Mst. Nanni Begum daughter of Abdul Hakim and widow of Shamsuddin through the General Manager Court of Wards, Ajmer .... *Appellant.*

Versus.

Abdul Samad deceased represented by Moinuddin minor under the guardianship of Abdul Ghafur uncle of the minor (2) Abdul Ghafur (3) Sharfuddin (4) Abdul Rahim, (5) Abdul Aziz alleged sons of Abdul Hakim of Ajmer (6) Hira Patel of Dilwara (7) Kamaruddin son of Mir Imam Ali (8) Mst. Wasist bibi of Basharat Ali died represented by minors Abbas Ali, Abid Ali, Abeda Begum, Badsha Begum under the guardianship of Basharat Ali (9) Hasinuddin son of Fakhruddin of Ajmer .... *Respondents.*

Plea of Res-Judicate-Whether can be raised for the first time in appeal. Does failure to set up amounts to waiver:

A plea of Res-judicata can be waived but a mere failure to set it up in the trial court does not amount to waiver.

53 Allahabad. 65
8 Patna 107 Foll.
36 Indian Cases 289
1929 Calcutta 163- Distinguished.

Counsel —Mr. Daya Shanker for the ... ... *Appellant.*
Mr. Jasodhanandan for the ... ... *Respondent.*

Date of Judgment— 4-10 1933.

Subject matter of the case.

Memo of appeal filed on 1st July 1933 under Sec. 14 of Ajmer Court's regulation IX of 1926 against the judgment and decree dated the 14th March 1933, passed by the Additional District Judge, Ajmer in Civil Appeal No. 77 of 1933.

Judgment.— The facts material to this second appeal are as follows:—

One Abdul Hakim died leaving him surviving (1) Mst. Nanni Bibi, a daughter by his wife Mst. Mohamed Begum, (2) Hasinuddin, a son of a deceased son of Mst. Mohamed, (3) Five sons of another wife Mst. Azimannisa. Abdul Samad the eldest of these 5 sons filed a petition for Letters of Administration to Abdul Hakim's estate. The petition was opposed by Mst Nanni who alleged that Mst. Azimannisa was not the legal wife of Abdul Hakim but only a mistress. The Additional District Judge held that Azimannisa was Abdul Hakim's legal wife and granted Letters of Administration. Subsequently Abdul Samad and his four brothers filed a suit against Mst. Nanni and others praying for a declaration that they were the heirs of Abdul Hakim and asking for accounts and an injunction. The trial Court decreed the suit on its merits. Mst. Nanni appealed on the ground that Mst. Azimannisa was not the legal wife of Abdul Hakim. The respondents contended that the point was *res-judicata* by the decision in the Administration proceedings. The Additional District Judge upheld this contention and dismissed the appeal.

53 Allahabad. 65
8 Patna 107 Foll.
36 Indian Cases 289
1929 Calcutta 163- Distinguished.

Counsel.—Mr. Daya Shanker for the ... ... *Appellant.*
Mr. Jasodhanandan for the ... ... *Respondent.*

Date of Judgment— 4-10 1933.

Subject matter of the case.

Memo of appeal filed on 1st July 1933 under Sec. 14 of Ajmer Court's regulation IX of 1926 against the judgment and decree dated the 14th March 1933, passed by the Additional District Judge, Ajmer in Civil Appeal No. 77 of 1933.

Judgment.— The facts material to this second appeal are as follows:—

One Abdul Hakim died leaving him surviving (1) Mst. Nanni Bibi, a daughter by his wife Mst. Mohamed Begum, (2) Hasinuddin, a son of a deceased son of Mst. Mohamed, (3) Five sons of another wife Mst. Azimannisa. Abdul Samad the eldest of these 5 sons filed a petition for Letters of Administration to Abdul Hakim's estate. The petition was opposed by Mst Nanni who alleged that Mst. Azimannisa was not the legal wife of Abdul Hakim but only a mistress. The Additional District Judge held that Azimannisa was Abdul Hakim's legal wife and granted Letters of Administration. Subsequently Abdul Samad and his four brothers filed a suit against Mst. Nanni and others praying for a declaration that they were the heirs of Abdul Hakim and asking for accounts and an injunction. The trial Court decreed the suit on its merits. Mst. Nanni appealed on the ground that Mst. Azimannisa was not the legal wife of Abdul Hakim. The respondents contended that the point was *res-judicata* by the decision in the Administration proceedings. The Additional District Judge upheld this contention and dismissed the appeal.

The Judgment in *Ma Kyway V Ma Mi Lay* (6 Rangoon 682)' is so brief that I am entirely unable to say whether the Learned Judges who decided it would have upheld the distinction made out by Mr. Daya Shanker. I therefore do not propose to discuss whether the decision in that case was right or wrong and I propose to consider the present case independently of it. Section 5 of Act XIX confers a title to receive a sum deposited in a Provident Fund on the person duly nominated in accordance with the rules of the funds unless such nomination is varied or cancelled by the subscriber. It is clear Mr. Daya Shanker does not dispute this that after the introduction of Act XIX marriage would not revoke a nomination. But I think the word "nomination" in Section 5 must mean a nomination which had some force at the time when Section 5 become law. It is just possible to argue that a nomination which is contrary to the personal law of the subscriber can, since it is at least an expression of the intention of the nominator, be valided by the subsequent enactment of Section 5. But a nomination which was once valid and then becomes void owing to subsequent marriage is nothing at all. It is not an expression of intention since the nominator must be presumed to have known that marriage made it void. Had he desired to exclude his wife, there was no legal obstacle to his making a subsequent nomination in the same terms as the present one. The nomination paper itself recites that in the event of marriage a fresh nomination must be made. On the whole therefore I incline to the view that Section 5 of Act XIX has no application in the present case, because there was not at the time when it came into force any outstanding nomination within the meaning of the section.

The appeal fails and is dismissed. But as a difficult and doubtful point of law is involved and a point moreover of first impression. I make no order as to costs.

[illegible]

Civil Second Appeal Nos. 26 & 28 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

The Bengal Nagpur Railway by its Agent at Calcutta	Civil Second Appeal No. 26 of 1933.	*Appellants.*
Versus.		
Firm Sita Ram Ajodhya Pershad of Ajmer (2) The B B.&C.I. Railway Company through its Agent at Bombay (3) The East India Railway Company through the Secretary of State for India in Council		*Respondents.*
The B.B.&C.I. Railway Company through its Agent at Bombay ...	Civil Second Appeal No. 28 of 1933.	*Appellants.*
Versus		
Firm Sita Ram Ajodhya Pershad of Ajmer (2) The B. N Railway by its Agent at Calcutta (3) The East India Railway Company through the Secretary of State in Council		*Respondents.*

(a) In second appeal under Section 15 of Regulation 1 of 1877. Whether concurrent findings of fact or law are binding on High Court.

Once it is shown that a second appeal lies under section 15 of Regulation 1 of 1877 the High Court is seized also of all points on which concurrent finding have been given by both the lower Courts and which might have been made the subject of a reference to the Allahabad High Court under section 17 of the Regulation by any party to the appeal This does not apply to concurrent findings of fact as section 15 of the Regulation is to be read subject to section 16 which makes the decision of the trial Court where confirmed by the appellate Court on a matter of fact final.

Civil Second Appeal No 77 of 1930.

(R S. Pandit Chandrika Prasad. Versus B. B & C. I. Railway) Dissented from

(b) Whether non-delivery amounts to loss. Burden of proving loss or whom lies:

Mere non-delivery does not amount to loss. In suits based on non delivery the Railway Company must prove loss affirmatively.

45 Bombay 1201
45 Allahabad 530
51 Calcutta 615
3 A. M. L. J. 3
6 Patna 189 Foll
1926 Patna 165
1926 Patna 148
1926 Patna 190

1926 Lahore 596 Dissented from 6 Patna 718 Referred

(c) Railway receiving consignment whether agent of railway which has to deliver it.

The Railway Company receiving a consignment for despath to a place on another Railway is not an agent of the Railway Company which has to deliver it.

1924 Patna 811 not followed.

(d) Railway other than the receiving railway. When can be liable

A Railway to whom the goods were not in the first instance consigned cannot be held liable unless the loss is proved to have occurred on its system.

23 I. C. 22
48 I. C. 294
1926 Lahore 116
1926 Allahabad 299 Foll

(e) Costs in suits against two or more railways. By whom payable.

When goods have travelled over the systems of more than one Railway Company plaintiff is practically bound to sue all the companies concerned since he does not know where the missing goods are. Ordinarily therefore it would be equitable that the Company found liable should pay the costs of the companys exonerated.

Counsel.—Mr. Jasodha Nandan for the appellant B.N. Railway.
Mr. K. S. Mathur for the B. B. & C. I. Railway.
Appellant.

Mr. Mohan Lal Capoor for the plaintiff respondent.
Mr. Parmatma Swaroop for the ... *Respondent.*
E. I. Railway.

Date of judgment: 2.10.2[illegible]

Subject matter of the case.

Memo of appeal filed on 1st July 1933 against the judgment and decree dated the 18th February 1933, passed by the Additional District Judge, Ajmer in Civil Appeal No. 119 of 1929

Judgment.—These two appeals arise out of a suit for non-delivery of a box of *Attar* forming part of a consignment booked at Chattarpur on the Bengal Nagpur Railway for despatch to Ajmer. The East India Railway and the Bombay Baroda and Central India Railway over whose lines the rest of the consignment travelled were also made defendants. The consignment was booked under risk note "X" which is in terms similar to Sec. 75 of the Railways Act, that is to say it absolves the Railway Company from all responsibility for loss destruction or deterioration. The Bengal Nagpur Railway pleaded delivery to the East India Railway and the East India Railway pleaded delivery to the B. B. & C. I. Railway. All the railways pleaded that the risk note absolved them from liability and the E. I. Railway further pleaded want of notice.

2. The trial Court held, (1) that the B. N. Railway had proved delivery but that the E. I. Railway had not. (2) that Sec. 75 of the Railway Act and risk note "X" afforded no protection until loss was affirmatively proved, (3 that loss was not proved (4) that notice had duly been served on the E. I. Railway. It therefore passed a decree against the E. I. Railway and the B. B. & C. I. Railway and further directed them to pay the costs of the plaintiffs and of the B. N. Railway.

3. Both the Railways made liable appealed. The learned Additional District Judge agreed that the railways were bound to prove loss in order to claim the protection of risk note "X" but held that the B. N. Railway had not proved delivery to the E. I. Railway, and that proper notice was not

served on the E. I. Railway. He therefore exonerated the E. I. Railway and passed a decree against the B N. Railway and the B B. & C. I. Railway.

4. Mr. Mohan Lal for plaintiff respondent takes a preliminary point that the appeal by the B. B. & C. I. Railway is incompetent as the appeal is governed by Regulation 1 of 1877 and the decree in first appeal has as regards the B. B. & C. I. Railway confirmed the decree of the trial Court. Mr. Mathur replies that the appellate Court has varied the decree against the B. B. & C. I. Railway by substituting a new co-judgment debtor and by awarding the E I. Railway costs from the B. B. & C. I. Railway. The variation is I think sufficient to bring the case under Sec. 15 of Regulation I. For if it did not, the absurd position would arise that while the B. N. Railway's appeal lay to this Court the B. B. & C. I. Railway's remedy would be a reference to the Allahabad High Court a position which might conceivably result in two inconsistent decrees being passed in the same suit.

5. Mr. Mohan Lal then argues that at any rate this Court is bound by concurrent findings of the Courts below whether of fact or law and cites the decision of this Court in the *B. B. & C I. Railway* VS R. *S. P. Chandrika Prashad* (C. S. A. No. 77 of 1930). In that case the defendant appealed against the decree of the trial Court on seven grounds He succeeded on four out of the seven and the suit was dismissed On 2nd appeal by the plaintiff he wished to urge under O. 41 R. 22 that the lower appellate Court's finding on the remaining three grounds was wrong Jolly J C. held that he could not do so, since had the decree in the lower appellate Court been wholly against him he could not have filed a 2nd appeal on those grounds.

6. With all due respect I am unable to accept this reasoning so far as questions of law are concerned. For although there is under Regulation I of 1877 no 2nd appeal

against concurrent decisions of law there may be a reference to the Allahabad High Court. If in the case cited the defendant had failed entirely in first appeal he could have gone to the Allahabad High Court on all points of law. The effect of Jolly J. C's. decision was to deprive him entirely of his right to impugn decisions on points of law, which he would have had if he had been less successful on other points in first appeal. For it cannot I think be argued that that remedy still lay open to him after the Judicial Commissioner had substantially rejected his appeal. In my view therefore once it is shown that 2nd. appeal lies under Sec. 15 of Regulation I of 1877 this Court is also seized of any points which might have been made the subject of a reference to the Allahabad High Court under R. 17 by any party to the appeal.

7. Concurrent findings of fact stand on a different footing. Under Sec. 15 a 2nd. appeal lies when the decision in first appeal reverses or modifies the decision of the trial Court and is not declared by any law for the time being in force to be final. But by Sec. 16 when a Court of first appeal confirms a decision of the trial Court on a matter of fact its decision is final. Plainly therefore section 15 should be read subject to Sec. 16 and it is not open to the appellants to challenge concurrent findings of facts.

8. The points argued in appeal are as follows:—

(1) Non-delivery by itself amounts to loss and it is not necessary for a Railway Company to prove loss affirmatively.

(2) The B. B. & C. I. Railway is not liable as there is no proof that it handled the missing package,

(3) The B. N. Railway did in fact deliver the missing package to the E. I. Railway and is therefore not liable.

(4) The plaintiff and not the companies should have been made liable to pay the E. I. Railway's costs.

9. As regards the necessity of proving loss in suits based on non-delivery the decisions of the various High Courts thougt not uniform are mainly in favour of the view taken by the Courts below vide *Ghelabhai Punsi* Vs. *E. I. Railway* (45 Bom. 1201) *E. I. Railway* Vs. Kishen Lal (45 All. 530) *E. I. Railway* Vs. *Jogpat Singh* (51 Cal. 615). Mr. Mathur refers to 3 Patna cases *G. I. P. Railway* Vs. *Datti Ram* (1926 Patna 148) E. I. Railway Vs. Gobhardhan Das (1926 Pat. 165) and G. I. P. Railway Vs. Rameshwar Pd. (1926 Pat. 190) (165 and 190) which support the Railway's contention But in a latter case *Ganesh Das* Vs. *E. I. Railway* (6 Pat. 189) Jwala Prasad J took an opposite view. In *Puran Das* Vs. *E. I. Railway* (6 Pat. 718) the point was referred to a Full Bench. It was held by majority that the reference did not arise out of the case before the Court but two Judges, Dawson Miller C. J. and Jwala Prasad J expressed the opinion that mere non-delivery did not amount to loss. The earlier Patna decisions therefore have ceased to be authorities. In *Govind Ram Bughi Mal* Vs. *Secretary of States for India* (1926 Lah 596) the view contended for by Mr. Mathur was taken but that is the only case on which he can rely. Further the view of the majority was taken by this Court in *Kanhiya Lal Perbeen Chand* Vs. *The B. N. Railway* (3A.M.L.J. 3).

10. It is then argued that all the above decisions refer to cases falling under Sec. 72 and risk note "B" and have no application to cases falling under Sec. 75 and risk note "X". In both sections 72 and 75 and in the risk notes which come under them the words used are "loss, destru tion or deterioration". No argument has been advanced why the words should be differently constructed in different sections nor has any authority been cited. Mr. Mathur refers to the *G. I. P. Railway* Vs *Ramchandra Jagannath* (43 Bom. 386) and *The B.N.W. Railway* Vs. *Tupan Das* (1926 Pat. 384) but in each case it was held that either loss or deterioration was proved

11. I therefore hold that when a Railway is protected either absolutely or under conditions against liability for loss and a suit for non-delivery is filed against it the raliway in order to escape liability must prove affirmatively that loss occurred.

12. The point whether the B. B. & C. I. Railway can be liable without proof that the missing package came into its hands has not been dealt with in either of the Courts below. In the trial Court this is no doubt due to its not being set up in the written statement. It was definitely set up in the memo of first appeal. But it frequently happens that all the grounds taken in the memo of appeal are not pressed and from the notes of arguments in the Additional District Judge's Court the point seems to have been only touched on very lightly. In my judgment however it is a good point. The suit is based on non-delivery and there can be no obligation on the B. B. & C. I. Railway to deliver goods which it has not received. Mr. Mohan Lal argues that the railway receiving a consignment is in law the agent of the railway which has to deliver the consignment and cites *Arjun Das Gulab Rai* Vs. *E. I. Railway* (1924 Pat. 811) as authority for this. That is a single Judge decision and no reasons for this assumption are given. When loss is alleged there is ample authority for holding that a Railway to whom the goods were not in the first instance consigned cannot be held liable unless the loss is proved to have occurred on its system vide *E. I. Railway* Vs. *Nope Chand* Magniram (23 I.C. 22) *The Agent G. I. P.* Vs. *Karaylal* (48 I. C. 294) *Darbari Mal Ram Sahai* Vs. The Secretary of State (1926 Lah. 116) and *Chandrabhan* Vs. *the E. I. Railway* (1926 All. 299). Had the receiving Railway been in law the Agent of the delivering Railway these rulings must have been differently decided. I therefore hold that as it is not proved that the missing package reached the hands of the B. B. & C. I. Railway, that Railway is not liable.

13. Coming to the 3rd point I agree with the learned Additional District Judge that the B. N. Railway has not proved delivery to the E. I. Railway. The E. I. Railway's admission of delivery in its written statement is not binding on the plaintiff. The only evidence is that the E.I. Railway received the consignment from the B.N. Railway. Now 4 packages were sent and 4 packages were delivered but one of the packages sent was not among the packages delivered i.e. somewhere in the course of the journey the package was substituted for another. It was therefore incumbent on the B. N. Railway to prove not merely that a consignment of 4 packages had been delivered to the E.I. Railway but that the 4 packages in the consignment were identical with those originally booked with the B. N. Railway.

14. The question of costs presents some difficulty. When goods which are not delivered have or should have travelled over the systems of more than one Railway Company plaintiff is practically bound to sue all the Companies concerned since he does not know where the missing goods are. Ordinarily therefore I think it would be equitable that the Company found liable should pay the costs of the Company exonerated. But as regards the E.I. Railway plaintiff has failed on the technical point that he did not give proper notice. On this special ground I think the plaintiff must pay the costs of the E.I. Railway.

15. I confirm the decree of the lower appellate Court in so far as it awards plaintiff damages from the B. N. Railway and set it aside in so far as it awards damages against the B. B & C. I. Railway. I also set it aside in so far as it directs the B. N. Railway and the B. B. & C. I. Railway to pay the costs of the E. I. Railway and direct that plaintiff will get his costs throughout from the B. N. Railway. The B. B. & C. I. Railway not having raised the point on which it has succeeded in its written statement or argued it fully in first appeal, must bear its own costs throughout.

Appeal of B. B. & C. I. Railway accepted
Appeal of B. N. R. Dismissed.

Shorts Notes of Important Judgments.

(1) (*a*) **O. 21. R. 66 C.P.C. Sale-Proclamation:**

What it should include and what can be claimed thereafter:—

The sale proclamation shall specify as fairly and accurately as possible the amount for the recovery of which the sale is ordered, which should include all sums for future interest and costs incurred and due upto that date. Any such sum not included in the sale proclamation cannot be claimed thereafter in that Darkhast except costs incurred and allowed subsequent to the sale proclamation.

(*b*) **Costs of Execution-Proper time for claiming them :**

The most suitable time for claiming costs of Execution is when the sale proclamation is drawn up, but a request made at any time before the Darkhast is finally disposed of is not too late.

Miscellaneous Civil appeals Nos. 35 and 43 of 1933.

Poosa Mal of Beawar, Versus Mst. Hangam Koer and other of Ajmer.

Date of Judgment: 14th October, 1933.

(2) Section 56 (2) (*b*) of the Provincial Insolvency Act: Receiver's Commission on what 'assets' to be allowed·

When an encumbered property is sold by the Receiver in bankruptcy of his own motion the balance of authority supports the view that the receiver is entitled to his commission only on the balance of the sale proceeds which is available for distribution among the unsecured creditors. But when a secured creditor comes to Court and asks that the Receiver

should sell the mortgaged property he does consent by necessary implication to the Receiver getting his commission on the whole sale-proceeds.

Miscellaneous Civil appeal No. 33 of 1933.

and

Civil Revision Application No. 134 of 1933. R. B. Seth Biradh Mal Lodha, Versus Prabhu Dayal Nazir, Small Cause Court, Ajmer.

Date of judgment 14th October 1933.

(3) (*a*) Damages-suit for libel-Special damages when necessary to prove:

There are some cases in which proof of Special damage is unnecessary and these include the imputation of a Criminal offence punishable with imprisonment.

(*b*) Privilege other than absolute when not a good defence:

Privilege other than absolute is no defence if there is malice.

(*c*) Whether second appeal lies on finding of malice.

Whether there is malice or not is a finding of fact which cannot be challenged in second appeal.

Civil second appeal No. 41 of 1933.

G. Cornelius of Ajmer. Versus Rev: Lakshmi Chand and others.

Date of judgment 14th October, 1933.

(4) Interlocutory application filed in Court Office: Duty of applicant :

When an interlocutory application is presented not to the Judge in Court but to his office, there is no duty cast on

the Court to let the applicant know what orders have been passed on it-it is for the applicant to come himself and enquire.

Civil Revision application No 121 of 33.

Abdul Nabi Khan of Gangwana. Versus. The General Manager Court of Wards, Ajmer.

Date of Judgment 14th October, 1933.

(5) Adjournment on ground of Counsel's engagement in another Court. When to be granted.

As Counsel frequently have to appear in more courts than one on the same day, a request for postponement of a case on this ground should ordinarily be granted when this will not entail inconvenience to the other side or dislocate the Judge's work.

Small Cause Court Revision Application No 112 of 1933.

Firm Rama Nand Nath Mal of Ajmer. Versus. Firm Jai Kishan Lal Choiey Lal of Agra.

Date of judgment 17th October. 1933.

(6) Appeal dismissed for default. Section 151 C. P C. and article 168 of the Limitation Act Application and scope of.

When the Civil Procedure Code prescribes a particular procedure for setting aside a dismissal for default that procedure is exhaustive and section 151 cannot be used. When an appeal is dismissed for default the proper remedy for its restoration is an application under O 41 R 19 and not Section 151. But when the appellant had no notice of the hearing he can have resort to Section 151 because O 41-R 19 read with article 168 of the limitation Act pre-supposes the proper service of summons on the appellant.

45 Bombay 648

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Miscellaneous Civil Appeal No. 40 of 1933.

Treated as Civil Revision Application No. 175 of 1933.

Mathara Das of Nayanagar. Versus. Kalyan Mal and others of Nayanagar.

Date of Judgment 28th October. 1933.

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S. C. C. Revision No. 163 of 1933.

BEFORE MR. D. R. NORMAN, I. C. S.

Mangi Lal .. .. Applicant.

Versus.

Basanti Ram .... Opposite Party.

Small Cause Court Revision No. 163 of 1933, decided on February 13, 1934, against the order, dated the 10th July 1933, passed by the Judge, Small Cause Court, Ajmer, in suit No. 4431 of 1932.

(a) Award of interest by way of damages—When to be allowed:

When interest is not payable by agreement or under statute the mere detention by the defendant of money due to the plaintiff is not a ground for awarding it There must be some-thing in addition, such as fraud or breach of trust.

Civil Revision No. 122 of 1932 and 57 Calcutta 953, not followed,

Civil Revision No. 38 of 1933,

50 Mad. 94,
53 Mad. 519,
50 All. 818,
55 All 164,
12 Patna 216, Discussed and approved.
1933 Lahore 212 followed.

(b) Khata executed-including item of interest—Whether it is necessary to prove contract to pay interest·

When a party has executed a Khata in which there is an item of interest it is not necessary for the plaintiff to bring independent evidence of a contract to pay interest.

Mr. G. P. Mathur —for the applicant.
Mr. Chunni Lal—for the opposite party.

Judgment.—The only point on which this application has been admitted is whether the plaintiff opponent was entitled to interest. The suit was for the recovery of the price of goods sold and plaintiff alleged an oral agreement to pay interest which was denied by the defendant. The trial Judge held that the oral agreement was not proved, but allowed interest to the date of suit at 6% on the ground that the defendant had not paid the dues of the plaintiff for a long time. It is now contended by the defendant that interest by way of damages can not be awarded.

2. On this point the rulings of this Court have not been consistent. In *Bal Singh* vs. *Ratan Lal*[1] Macklin, J. C. held that interest by way of damages could be awarded. He remarked:—

> "Clearly the plaintiff was being kept out of his money, and to this extent he was unable to draw interest at the ordinary Bazar rate by lending to other people."

Subsequently in *Kanhiya Lal* vs. *Hunja*[2] I held that interest can not be awarded unless there is an agreement for it, express or implied, or unless it is payable under some law such as the Interest Act. In neither judgment was any reference made to decided cases.

3. Some of these I will now briefly examine. In *Kandappa Mudaliar* vs *S. R. Muthuswami Ayyar.*[3] A Full Bench decided, by majority of two to one, that interest by way of damages can not be allowed. In that case money had been advanced for goods which were not supplied. In *Nanchappa-Coundan* vs. *Valasati Ittichathara Mannadiar*[4] it was held that interest by way of damages on a debt with-

(1). C. R. No 122 of 1932 5 A. M. L. J.—Part II, Short Note No 4

(2). C. R. No 35 of 1933 6 A. M. L. J.—Part I, Short Note No 1

(3). 52 Mad 94=1927 Mad 97

(4). 53 Mad 549=1930 Mad 727

held was not allowable under Sec. 73 of the Contract Act, but could be awarded (a) if the debt were secured on land or (b) on money obtained or retained by fraud. In *Anrudh Kumar* vs. *Lachhmi Chand.*[1] the defendant by means of a forged will had kept the plaintiff out of money to which he was rightfully entitled and interest was allowed. This case would fall under the second exception set out in *Nanchappa Goundan* vs. *Vatasari-Ittichathara Mannadiar.* In *Kishwar Jahan Begam* vs. *Zafar Muhammad Khan*[2] interest was allowed on money due from a trusee to *cestui one trust* who had unreasonably detained it The Court there observed .—

> "Where a case, in England, would fall within the common law jurisdiction, no equitable principles are to be applied in awarding or withholding interest; but where a case falls within the equitable jurisdiction exercised by the Court of Chancery, equitable considerations might induce the Court to allow interest."

In *J. H. Pattinson* vs. *Srimati Budhya Debi*[3] and *Jagat Singh* vs. *Jagat Singh Kawatra*[4] it was held that interest by way of damages could not be awarded. The latter case is exactly parallel to the present one, as the suit was for the recovery of the price of goods sold. On the other side the only ruling relied on is *Kumarchandra Gain* vs. *Narendranath Mitra.*[5] But there the point is not discussed at any length and no case law is quoted

4. The balance of authority is therefore in favour of the view that the mere detention by the defendant of money due to the plaintiff is not a ground for awarding interest There must be something in addition, such as fraud or breach of trust. This is the view which I propose to adopt, and if that were all this application would succeed

(1) 50 All. 818=1923 All 503.
(2) 55 All 161 =1933 All. 156
(3) 12 Pat. 216=1933 Pat 196
(4) 1933 Lah. 212.
(5) 57 Cal 953=1930 Cal 357.

5. *It has however been argued on behalf of the plaintiff* that his statement that there was an agreement to pay interest ought to have been accepted, since in the suit khata which was signed by the defendant there is an item for interest. *The trial Judge seems to have lost sight of this fact altogether.* It is true that in his written statement the defendant contended that the accounts were never explained to him, but he does not seem to have pressed the point as it does not *appear among the points for determination and the* trial Court awarded plaintiff a decree without insisting on proof of any individual items in the khata. When a party has executed a khata in which there is an item of interest I do *not think it is necessary for the plaintiff to bring independant* evidence of a contract to pay interest.

6. The application, therefore, fails and is dismissed with costs.

Application dismissed.

Criminal Reference No. 58 of 1933.

BEFORE MR. D. R NORMAN, I.C.S.

Municipal Committee, Ajmer .... Applicant.

Versus.

Rahmatullah and others .... Opposite Party

Criminal Reference No. 58 of 1933, decided on February 13, 1934, under Sec. 438 of the Code of Criminal Procedure made by the District Magistrate, Ajmer, with his order dated the 14th December, 1933

Ajmer Municipalities Regulation—Sections 109 and 110—Jurisdiction of ***Magistrates to question reasonableness of orders passed there-under.***

When the law gives powers to a Committee it is not for the Magistrate virtually to take away those powers by arrogating to himself the

function of deciding whether they were reasonably exercised. It is however open to the Magistrate to question the legality of the order.

43 All 644 **Followed.**

Mr. Chunni Lal—for the Applicant.

Opposite Party in person.

Judgment.—This is a reference from the District Magistrate. On 22nd September 1932 the Sanitary Sub-Committee of the Ajmer Municipality issued notices under Sec. 109 (3) and Sec. 110 (1) of the Municipal Regulation on three joint owners requiring them to do three things to a privy.

(1) to white wash and repair it.

(2) to provide proper receptacles.

(3) to affix a door.

This requisition and a second requisition issued on 20th December 1932 not being complied with the Municipality instituted a prosecution under Sec. 219 on 2nd March 1933. Pending the hearing the accused complied with requisitions (1) and (2). The Magistrate dismissed the complaint as regards the door, and admonished the accused as regards the other items in the complaint.

2. The District Magistrate in his reference remarks that the order of the Honorary Magistrate is ridiculous and that he should have either wholly acquitted or convicted the accused.

3. I agree that the order of admonition was not a correct one. The Magistrate does not state under what Section of the Code he purported to make it. But if he was thinking of Sec. 562 (1A), that sub-section is confined to offences under the Indian Penal Code. Further more even if admonition were legal it would be inappropriate. If the only penalty for failing to comply with a Municipal requisition is a warning, it is clear that the Municipality will never be able to get its orders complied with without launching

prosecution. In such cases therefore the Magistrate should invariably inflict a small fine.

4. A second point was raised before me which is not referred to by the District Magistrate. The Honorary Magistrate dismissed the complaint as regards door on three grounds:

(1) that the neighbours made no complaint.

(2) that the door way of the privy is inside the house and is not visible to passers by.

(3) that a door is unnecessary.

It is contended on behalf of the Municipality that it is not open to the Magistrate to question the reasonableness of requisitions issued by the Committee.

5. To this I agree. When the law gives powers to a Committee it is not for the Magistrate virtually to take away those powers by abrogating to himself the function of deciding whether they were reasonably exercised A direct authority on this point is *Emperor* vs. *Kashmiri Lal*[1]. This disposes of grounds (1) and (3) in the Magistrate's judgment. It is however open to the Magistrate to question the legality of the order Under Sec 109 (3) the Committee is empowered to require an owner to screen a latrine from the view of persons passing by or dwelling in the neighbourhood. If therefore the latrine opens only into the interior of the house a requisition for the construction of a door would not be legal. The Magistrate has remarked that the door is not visible to the passers by outside. On behalf of the Municipality it is said that the latrine is in a haveli consisting of many quarters and that it is visible to the other occupants of the haveli. If that is so the order of the Committee was legal. If the case were an important one I should therefore have to direct a retrial. But Mr Chunni Lal for the Municipality

(1) 43 All 641=1921 All 267

states that he does not press for this and that all he desires is a ruling on the jurisdiction of the Magistrates to question the reasonableness of an order under Sec. 109 or 110.

6. I accept the reference. set aside the order of the Magistrate and fine each of the opponents Rs. 2/- for a breach of requisition (a) and (b) stated above. In default one week's simple imprisonment. The fine should be paid in the Court of the Magistrate-one week's time allowed.

Reference accepted.

Civil Second Appeal No. 49 of 1933.

BEFORE MR. D.R. NORMAN, I.C.S.

Abbas Ali .... Appellant.

Versus.

Firm Beni Gopal Narain Das ... . Respondent.

Second Appeal No. 49 of 1933 decided on February 14, 1934, against the judgment and decree, dated the 21st October 1933, passed by the Special Additional District Judge, Ajmer, in Civil Appeal No. 152 of 1933.

(a) Section 34 of the Indian Evidence Act—What amounts to sufficient corroboration of entries thereunder:

It is settled law that the evidence of the plaintiff alone may be in law sufficient corroboration of regularly kept accounts. A party cannot be expected to remember all the details of an account extending over many months. All he can say is that the transaction took place and that they were entered in the accounts. Thus the general evidence of a party the transaction embodied in the accounts really took place may . boration.

(b) Mutual and open account under article 85 of the Limitation of :

To make article 85 of the Limitation Act applicable it is not necessary that any demand should in fact have been made. The mere fact that the account usually stood in favour of one party would not make the article in-applicable so long as there was no inherent reason why it should not have stood in favour of the other party. *87 I.C. 832* **Followed.**

1933 Lahore 12 **Distinguished.**

Mr. Jasoda Nandan—for the Appellant.
Mr. Swaroop Narain—for the Respondent.

Judgment.—Appellant used to make gold lace for the respondent. In the respondent's account he was debited with the weight of the material supplied and credited with the weight of the finished articles. He was further debited with cash advances given from time to time and was credited with his wages, the wages being calculated at so much per tola on the finished article. Respondent filed a suit for the balance due on the account including the value of materials supplied to appellant and not returned in the form of finished articles. The trial Court awarded respondent a decree for Rs. 628,3/9 and this decree was confirmed on appeal by the Special Additional District Judge.

In second appeal two points are taken:—

(1) There was no legal corroboration of respondent's accounts.

(2) The suit is not in time.

The main evidence in corroboration of the accounts is the statement of plaintiff. It is settled law that the evidence of the plaintiff alone may be in law sufficient corroboration of regularly kept accounts. I say 'may be' to make it clear that a Court is not bound to accept such evidence as sufficient corroboration. But this being a second appeal it can only succeed if it is shown that the corroboration is legally insufficient. Turning to the plaintiff repondent's evidence I find that though he has stated generally that he used to give materials and advances; and that he kept accounts thereof, he

has not deposed to every, or indeed to any, item specifically. It is argued that such a general statement does not amount to legal corroboration.

No case law is quoted in support of this arguement, and I do not think it tenable. A party cannot be expected to remember all the details of an account extending over many months. All he can say is that the transactions took place, and that they were entered in the accounts, the implication being that accounts contain no transactions which did not really take place. If it be argued that this adds nothing to the strength of a case, since the plaintiff is saying nothing from his own knowledge but is merely relying on the accounts, I think the answer is as follows. The law of evidence in India is founded on the law of evidence in England and the law of England is founded on the assumption that witnesses attach considerable sanctity to oath: Granting this assumption the general evidence of a party that the transaction embodied in the accounts really took place is obviously substantial corroboration since a man may compile in-accurate or even false accounts and yet may be unwilling to go into the box and swear that they are true.

The first ground therefore fails.

Coming to limitation the learned Special Additional District Judge applied Art. 85 but remarked that alternatively Art. 120 would apply. As he has dealt with this point in a few lines only I infer that it was not strenuously argued. In my view Art. 85 applies. The essence of a mutual account is that there should be reciprocal demands and that it should be impossible, to say without examination of the accounts, in whose favour the balance might be at any particular date. In the present case plaintiff had a demand for the value of his materials in the hands of defendant and for the advances in cash, while defendant had a demand for his wages. It is not necessary that any demand should in fact [illegible]

made. Probably the account usually stood in favour of the plaintiff but there is no inherent reason why it should have. If the defendant had at any time returned all the material in finished form before taking fresh material it would probably have stood in his favour. In fact it is defendant's case that at the date when he says the accounts closed it did stand in his favour. There is also one authority on plaintiffs' side namely *Moti Ram* vs. *Gambhir Prasad*[1]. In that case there was no advance of materials but in other respects it is on all fours with the present case. In *Dasaundhi Ram* vs. *Mool Chand*[2] relied on by defendants the facts were different the case being one of dealings between principal and agent. I therefore hold that the suit was rightly held to be in time.

Appeal dismissed.

(1) 87 I.C. 832=1925 Nag 295 (2) 1933 Lah 12.

Civil First Appeal No. 53 of 1933.

BEFORE MR. D.R. NORMAN, I.C.S.

Badri Lal .. ....(Defendant) Appellant.

Versus.

Ram Das .... (Plaintiff) Respondent.

First Appeal No. 53 of 1933, decided on February 19, 1934, against the judgment and decree dated the 9th October 1933 passed by the Sub Judge 1st Class, Ajmer, in Civil Suit No. 35 of 1932.

(a) Section 19 of the Evidence Act—Is admission of liability by a principal relevant in a suit against surety even though it was not made during the transaction for which the surety was bound — Is such admission conclusive —

Under Section 19 of the Evidence Act an admission of a principal does not cease to be relevant against the surety because it was made after

termination of the transaction for which the surety had bound himself. If that were the intention the farmers of the Act would have worded the last sentence of Section differently. But such admissions are not necessarily conclusive.

5 A.L.J. 142.

Woodroffe and Ameer Ali's law of Evidence (eighth edition). page 243 Dissented from. 20 I.C 637, Followed.

(b) In case of a conflict of decisions.—Is it always necessary in this district to follow the Allahabad High Court view:—

When there is a long course of decisions of the Allahabad High Court on a particular point it is usual to follow that view if there is a conflict of decisions. But when only a single decision is cited and there is a contrary decision of another High Court this Court is not bound to follow the Allahabad High Court and should apply its own mind to the point in issue.

Rai Bahadur Mithan Lal Bhargava
Mr. Jasoda Nandan Bhargava }—for the Appellant.

Mr. Daya Shanker Bhargava—for the Respondent

Order.—This is a first appeal against a decree of the First Class Sub-Judge, Ajmer, awarding a sum of Rs. 5247/2/- to the plaintiff respondent. The appeal is valued at Rs 5040/- but the arguments have been confined to a single item of Rs. 5000/-. Plaintiff opened a shop in Ajmer and took into his service one Ram Dayal. Defendant stood surety for Ram Dayal to the extent of Rs. 5000/-. The shop incurred heavy losses and Ramdayal executed a Khata in favour of the plaintiff for Rs. 1900/-odd. Plaintiff alleged that Ramdayal incurred these losses by speculation contrary to the terms of his employment and that defendant was liable to the extent of the surety bond.

2. Of the points raised in appeal I find it necessary to deal with two only.

(1) under the terms of the bond defendant was only liable for Ramdayal's dishonesty;

(2) plaintiff has not proved that the loss was incurred owing to speculation by Ramdayal.

3. I find in favour of the defendant on both points.

4. Under the terms of the surety bond (Ex. P/2) defendant made himself liable. 'If Ram Dayal should take away the assests of the firm or give away to any of his customer or creditors or any loss should accrue to the shop on account of him'. The trial Court considered that this last clause would cover loss due to misconduct. R.S. Mithan Lal for defendant argues that the principal of *ejusdem generis* applies and that the 'loss' in the general clause must be of the kind set out in the specific clauses. For this arguement there is a good deal to be said, and it is strengthened by a reference to the agreement of service executed by Ramdayal in favour of the plaintiff (Ex. P/1). This agreement was executed on the same day as the surety bond and it is therefore legitimate to refer to it in interpreting the surety bond. The agreement states that Ramdayal has provided a surety in case he should misappropriate any of the capital or give it away to any body. Then follows a general clause 'so for loss of any kind whatever occasioned by me the surety will be liable to pay'. Then in a later part of the document there is a promise not to resort to speculation. It appears to me that if it were a condition of Ramdayal's service that he should *provide security for loss occasioned* by speculation the clause against speculation would have been placed after the clause about misappropriation and before the general clause relating to loss of any kind. Further the surety bond does not mention Ramdayal's agreement not to speculate. Reading the two documents together it is clear to me that defendant stood surety for Ramdayal's honesty only and not for any loss that might be incurred by other branches of his agreement with plaintiff.

5 The second point raises an interesting point of law. Practically the only evidence that the loss on the shop is due

to Ramdayal's speculation is certain admissions of Ramdayal, in particular the Khata (Ex. P/3). It is argued by R.S. Mithanlal that an admission of liablity by a principal is not relevant in a suit against the surety unless that admission was made during the transaction of the business for which the surety was bound. In support of this he cites *Rambhajan Lal* vs. *Sheo Prasad*[1] and woodrŏffe Ameer Ali's Law of Evidence (Eighth edition) p. 243. For plaintiff Mr. Daya Shanker has cited *P.H. Parameswara Patter* vs. *Viyathen Sheedevi*[2] a Madras case, in which it was held that under Sec. 19 of the Evidence Act an admission of a principal did not cease to be relevant against a surety because it was made after termination of the transaction. I have not been able to trace any other decided case on the point.

6. R.S. Mithanlal argues that this Court usually follows Allahabad when there is a conflict of decisions When there is a long course of decisions of the Allahabad High Court to the same effect I agree that that is the usual practice. But when a single decision is cited and that a decision not in the Indian Law Reports series and there is a contrary decision of another High Court I think I am bound to apply my own mind to the point in issue.

7. I prefer the Madras decision. The Allahabad decision is a single Judge ruling and is based on an English case. Similarly in woodroffe and Ameer Ali's Law of Evidence the authority cited is Taylor's Law of Evidence and English cases. It is true that the Indian Evidence Act is based on the English law of Evidence but it does not necessarily follow that it reproduces the English law in every particular. For instance their Lordships of the P.C. in a recent interpretation of Sec 33 of the Evidence Act held that it did not completely reproduce the English law, vide *Krishnayya Rao* vs. *Raja of Pittapur*[3]. Sec. 19 of the Act

(1) 5 A. L. J. 142. (2) 20 I. C. 637. (3) 57 M. 1=1933 P. C 202.

is as follows:—'Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability'.

8 Now to prove defendant's liability it was necessary to prove Ramdayal's and Ramdayal's statements would certainly be relevant to prove his liability in a suit against him. He was also at the time he made these statements still subject to that liability. If the framers of the Act had desired to reproduce the English Law the last sentence of the section would surely have been worded differently.

9. But as was remarked in the Madras case such admissions are not necessarily conclusive and a Court must in deciding the weight to be attached to them, consider the circumstances in which they were made. In the present case I do not think them worth very much. The Sub-Judge was no doubt right in rejecting the evidence that Ramdayal was beaten into executing the khata (Ex. p/3). But prior to executing it Ramdayal had filed an insolvency petition, so the khata would not do him much harm. Moreover his letters to plaintiff e.g. Ex. p/8 show that he was endeavouring to conciliate plaintiff in the hope of further employment. I cannot therefore accept his admission unless it is substantially corroborated. Plaintiff's cousin Haridas who was also employed at the Ajmer shop makes a general statement that Ramdayal did 'Satta' transactions and Ramdayal who was examined as a defence witness says that loss was incurred for 'Sauda' transactions for which he was not responsible. But no attempt has been made to show what the exact nature of any one of the transactions, or what part Ramdayal had in them. I therefore find that it is not proved that plaintiff suffered loss owing to Ramdayal indulging in speculation contrary to the terms of his service bond.

10. The appeal thus succeeds on both grounds. I set aside the decree of the trial Court and award plaintiff a decre for Rs. 247/2/- with portionate costs in the trial court, Defendant is awarded cost on Rs. 5000/- in both Courts.

Appeal accepted.

Civil Second Appeal No. 8 of 1934.

BEFORE MR. D. R. NORMAN, I. C. S.

Fateh Chand and *Pukh Raj* .... (Plaintiff) Appellant.

Versus.

1. *Raman* deceased represented by his widows Mst. Jarao and 2. Mst. Chunni w/o Raman, Achraj of Beawar (Respondents.)

Civil Second Appeal No. 8 of 1934 decided on March 5, 1934, against the judgment and decree dated the 16th October 1933, passed by the Special Additional District Judge, Ajmer, in Civil Appeal No. 54 of 1933.

(a) Mortgage-suit—only personal decree granted—valuation on appeal by plaintiff for obtaining mortgage decree—How to be made.

Article 17 (VI) of the second schedule of the Court Fees Act: Applicability of

When a plaintiff who has partly succeeded appeals the general principal is that the appeal should be valued on the difference between what he has got and what he claims. In a case where a personal decree has been granted in a mortgage suit and the plaintiff claims a mortgage decree in appeal the relief claimed cannot be estimated and therefore under article 17 (VI) of the second schedule of the Court Fees Act a stamp of Rs. 10/- is sufficient.

(b) Legal representative of a deceased party already, on record—is application necessary to join him as such:

When a legal representative of a deceased party is already on the record no application to join him as such is legally required.

51 Madras 347.
2 Rangoon 415.
1933 Lahore 765 (a) followed.
10 Patna 311, not followed.

Mr. Moti Prasad :—for the appellants.

Mr. Jasoda Nandan : —for the respondents.

Order.—This is plaintiff's appeal and arises out of a suit to bring mortgaged property to sale. The amount claimed was Rs. 499 as principal and Rs. 499 as interest. The trial court held that the mortgage deed was not properly attested but granted plaintiffs a personal decree for Rs. 998. Plaintiffs filed an appeal on the last day of limitation on a court fee stamp of Rs. 20/-, but omitted to state how this valuation was reached. On objection by the office of the Additional District Judge they valued the appeal at Rs. 998 and paid the deficit. When the appeal came on for hearing defendants objected that it was time barred as full court fee had not been paid within the period of limitation. In reply plaintiffs contended that the appeal fell under either clause iii or clause vi of Act. 17 of schedule II of the Court Fees Act and that the proper stamp was Rs. 10. The learned Additional District Judge did not accept this argument and held that the appeal was time barred.

It further appeared that pending the appeal one of the plaintiffs had died and no application had been made to bring his heirs on the record. On this ground too the Additional District Judge held that the appeal failed.

Plaintiffs have preferred a second appeal to this court on a stamp of Rs. 10/-.

A preliminary objection is taken that the second appeal is improperly stamped and *Hira Lal vs. Hazari Mal*

Jeth Mal[1] is relied on. That case however is distinguishable, as then there was no dispute as to the amount of the court fee payable in the lower Appellete Court. The plaintiff had obtained a decree for Rs. 1534. Defendant's first appeal was rejected as time barred. He filed a second appeal on a stamp of Rs. 10/-. It was held that as the ultimate relief which he claimed was to the extent of Rs 1534 he must pay court fees on that amount. Here the plaintiff's argument is that the ultimate relief which he claims is covered by a court fee of Rs. 10/- and, if he is right in this, his second appeal is properly stamped. The preliminary objection thus fails.

Coming to the merits the first question is what was the proper court fee in first appeal. The point is not covered by exact authority. It is quite clear that Act 17 (iii) does not apply since plaintiff is not seeking a declaration but a decree which he can execute by bringing the mortgaged property to sale. But there are undoubtedly cases in which a plaintiff who has succeeded in part in the trial court has been allowed to file an appeal as regards the rest of his claim on a stamp of Rs. 10/- under Act 17 vi. An example is *Harcharan Das* vs. *Sukhraj Das*[2] in which the appellant who had obtained a decree for partition only objected to the method of partition. Another is *Radha Krishan* vs. *Mehtab Mian*[3] in which appellant who had obtained a decree for dissolution of partnership objected to the appointment of a receiver. It is not however necessary to refer them all, since none deal with the exact point raised here, and they were in my judgment rightly distinguished by the learned Additional District Judge.

The learned Additional District Judge though that the nearest decision was *Venkappa, Appellants and Narasinha, Respondent*[4]. There a mortgage decree against certain

(1) Vol VI of Ajmer-Merwara Law Journal, page 16

(2) 62 Indian Cases, page 979 (3) 1925 Lahore page 496.

(4) Vol. 10 of Indian Law Reporter, Madras, page 187.

lands had been passed and some of the mortgagors appealed in order to exonerate the lands from liability. But the facts are not fully given in the report and in particular it is not clear whether there was any personal decree against the Appellants. If not a successful appeal would have freed them from all liability and an ad valorem valuation was clearly the proper one. I am therefore unable to regard this decision as relevant to the present point. Two other cases are cited by Mr. Jasoda Nandan for the defendants. In *A.U. John* vs. *Suraj Bhan*[1] plaintiff filed a money suit against a company and sought a declaration that his debt had priority over certain debentures. He succeeded and the debenture holders appealed. It was held that ad valorem court fee were payable. This decision is clearly irrelevant since there was no personal decree against the debenture holders. In *Sabir Husain* vs. *Farzand Hasan*[2] plaintiff who had obtained a decree against X claimed in an appeal that the decree should also be against certain assets in the hands of Y and Z. The court held that the valuation in appeal was the amount claimed or the value of the assets whichever was less. Here again the same distinction applies for plaintiff had not obtained a personal decree against X and Y

The point is thus res integra and my own view is in favour of plaintiff appellants. When a plaintiff who has partly succeeded appeals the general principle is that the appeal should be valued on the difference between what he has got and what he claims. That in the present appeal would be the difference between the sum decreed and the amount which plaintiffs could realise in execution of their money decree. What this latter amount is cannot be estimated and it follows that the value of the relief claimed cannot be estimated. Act 17 (vi) therefore applies, the stamp originally affixed was sufficient and the first appeal was in time.

(1) Vol. 34, Allahabad Law Reports page 531 = 1913 All. 45.
(2) Vol. 31 Indian Law Reports (?) page 60[illegible]

I now come to the question of abatement. It is argued that there has been no abatement because the surviving plaintiff Pukraj is the cousin and legal representative of the deceased plaintiff, Fateh Chand. This assertion was made in the Additional District Judge's court by an application filed on the day of hearing, but the Additional District Judge having found against defendants on limitation quite reasonably did not think it worth while to adjourn the hearing to determine the truth of the allegation. I have therefore to determine whether when the legal representative of a deceased party is already on the record any application to join him as such is legally required. The balance of authority is that it is not required see *Achutan Nair* vs. *Manavikraman alias Kunhattan Raja*[1], *Ajodhya Nath Parhi* vs. *Emperor*[2] and various rulings of the Lahore High Court of which *Hakimali* vs *Shiv Narain*[3] is the latest. The only High Court which has taken an opposite view, is as far as I can ascertain the High Court of Patna, see *Musammat Waleyatunnissa Begam* vs. *Musammat Chalakhi*[4]. My own view inclines to that of the majority. Although I have never been apt to excuse obvious breaches of proper procedure I hold that when there are two alternative constructions of the Code possible a suit or appeal should not be made to fail on a technicality.

The result is that on the assumption that plaintiff is the legal representative of Fateh Chand the appeal succeeds, and the case will be ramanded for a decision on this point. If however plaintiff does not succeed in proving this, his first appeal must fail; since the finding of the lower appellate Court that failure to join the legal representative of Fateh Chand made the whole appeal incompetent has not been challenged in this Court.

(1) 51 Mad 517- 1929 Mad 152.
(2) 2 Rang 445=1925 Rang 95.
(3) 1933 Lah 765 (2)
(4) 10 Pat. 341=1931 Pat 164

As regards costs I am not inclined to award any in this Court, since the first appeal was not valued at the time of presentation and the argument that a stamp of Rs. 10/- was sufficient was not made until the day of hearing. Further the allegation that plaintiff is the legal representative of Fateh Chand was also not made till the day of hearing and as that omission rendered it impossible for the lower appellate Court to determine the question of abatement at the hearing the cost of that hearing must be paid by plaintiff appellants. The order of this Court is therefore as follows.

It is held that the Court fee paid on plaintiff's first appeal at the date of presentation was sufficient and that the appeal is not time barred. It is further held that if plaintiff is the legal representative of deceased Fateh Chand there has been no abatement, and the case is remanded to the Lower Appellate Court for determing this point. If plaintiff is held to be the legal representative of Fateh Chand the Lower Appellate Court will hear the appeal according to law; if not, it will reject the appeal. The costs of the hearing which has already taken place in the lower Appellate Court will be borne by plaintiff and the Lower Appellate Court will assess the pleader's fee. Each party will bear its own costs in this Court.

Appeal accepted and case remanded.

Small Cause Court Revision No. 3 of 1934.

BEFORE MR. D. R. NORMAN, I. C. S.

Ghisa Lal and *another* .... (Plaintiffs) Applicants

Versus.

Choga deceased represented by Devi and others.
(Defendants) Opposite parties.

Small Cause court revision, decided on March 17, 1934, against the order, dated 29th September, 1933, passed by the Judge, Small Cause Court, Ajmer, in Small Cause Court suit No. 708 of 1933.

Facts :—A suit was filed on a Khata. The Khata ran as under

'Khata of Nai Choga interest at one percent. Dated Magsir sudi 1st Sambat 1986, Rs 55/- Signed-Choga Nai. Money taken. Received Rs 55/-

The entry was attested but not stamped The plaintiff assumed it to be a bond and paid penalty accordingly At the hearing the Court held it to be an acknowledgment within the meaning of article 1 Schedule I of the Stamp Act and dismissed the suit on the ground that such an unstamped acknowledgment was inadmissible in evidence.

In revision it was argued that the entry was either (a) a bond or, (b) a receipt or, (c) an agreement and that it was not an acknowledgment within the meaning of article 1 of Schedule I of the Stamp Act.

Held · (1) That it was not a bond as it did not contain an explicit obligation to pay money,

22 Calcutta 757 **Relied** upon

1929 Madras 599,

1927 Nagpur 195,

1927 Cal. 472 Distinguished.

(2) That it was not a receipt. The words in Article 1 of Schedule I, of the Stamp Act following 'acknowledgment' are limiting and not defining A receipt is also a particular kind of acknowledgment as is clear from its definition in Section 2 (23) of the Stamp Act. *1933 All 577* **Dissented from.**

(3) That a receipt is admissible on payment of penalty as required by Section 35 of the Stamp Act not only against the maker but also against his legal representatives.

Mr. Chand Karan Sarda—for the applicants.

Mr. Jasoda Nandan –for the opposite parties.

Order.—This application arises out of a suit on a Khata. The Khata is headed Khata of Nai Choga interest at one percent," then follows an entry with which this application is not concerned and then the suit entry which runs: "Dated Magsir Sud 1st Samvat 1986, Rs. 55/-. Signed Choga Nai. Money taken. Received Rs. 55/ ." The entry is attested but not stamped.

The applicant paid the prescribed penalty on the assumption that it was a bond. But when the suit came on for hearing it was argued on behalf of the opponent that the entry was an acknowledgment within the meaning of Article 1 Schedule I of the Stamp Act and, therefore, that it was absolutely inadmissible. The trial Judge accepted this argument and held that the suit was not maintainable.

Mr. Chand Karan for the applicant now argues that the entry is alternatively either (*a*) a bond, or (*b*) a receipt, or (*c*) an agreement.

I do not think that the entry is a bond. It is the essence of a bond that the maker should oblige himself to do something (see Stamp Act, Section 2 (5) and that obligation should in my judgment be explicit and not depend on the legal presumption that an acknowledgment implies a promise to pay. In *Hira Lal* vs. *Queen Empress*[1] the Court said "The important word in this definition is the word 'obliges', and no document can be a bond within it unless it is one which itself creates an obligation to pay money, as is the case with those documents which are known as bonds according to the common use of the word, but is not the case with acknowledgments of advances, or of the purchase and receipt of goods, the obligation to pay for which is not created by the instrument, but arises from the promises to repay advances and to pay for goods, which the law always implies when money is borrowed or goods are purchased."

(1) 22 Cal 222.

The cases cited by Mr. Chand Karan are not to the point. In *Veerappudayan* vs. *Oganthappudayan*[1] there was an express promise to pay and though the actual words of the document are not given in *D. Rozario* vs *Hariballabh*[2] or in *Khetra Mohan* vs. *Jamini Kanta*[3] the judgment in each case suggests that there was an express promise.

The entry is however in my judgment a receipt. The same point arose in *Bindesari Prasad* vs. *Ram Tapesha Singh*[4] where the entry was in almost similar terms. The learned Judge held that it was not a receipt because it was *an acknowledgment as defined in Article I of Schedule I of* the Stamp Act. With all due respect, I am unable to accept this reasoning. Acknowledgment is not defined in Article 1. What that article says is that the proper stamp on an acknowledgment of a particular description is one anna. That is to say the words in the article following acknowledgment are limiting not defining. Actually, a receipt is a particular kind of acknowledgment as is clear from Section 2 (23) which says that a receipt includes a writing whereby money is acknowledged to have been received. In the light of this definition the present entry is certainly a receipt and the fact that it may also be an acknowledgment of the kind described in Article 1 cannot take it out of the definition.

Now the Stamp Act does not say that an acknowledgment of the kind described in Article 1 which is not duly stamped, cannot be admitted in evidence. Such a prohibition is enacted in a proviso (a) to Section 35, as regards instruments chargeable with a duty of one anna, but subject to certain exceptions. One of these exceptions is a receipt [vide proviso (b)]. The entry in suit is therefore admissible in evidence on payment of penalty, and as more than the prescribed penalty has been paid was wrongly excluded.

(1) 1929 Mad 599 (2) 1927 Nag 195
(3) 1927 Cal. 472. (4) 1933 All. 577.

One small point remains. It is argued that proviso (b) only makes a receipt admissible against the maker, whereas here it is sought to use it against the maker's legal representative. Taking the words absolutely literally this is true, but I think on general principles of law what is admissible in evidence against a person must also be admissible in a suit against his legal representatives on a liability incurred *by* that person.

Penalty having been paid it is unnecessary to consider whether by reason of the stipulation regarding interest the entry also amounts to an agreement.

The application therefore succeeds. I set aside the decree of the lower Court and remand the suit for disposal according to law. As the argument that the entry was a receipt was was not put forward in the trial Court I make no order as to costs.

Application allowed.

Law Points in certain Judgments.

(1)

Debi Din. Versus. *Anant Mal.*

Civil Second appeal No. 8 of 1933, decided on February 5, 1934, against the decree, dated October 6, 1932, in appeal No. 62 of 1929.

(a) Tort—Malicious Prosecution—want of reasonable and probable cause-Inference:

It is *sometimes* permissible to infer malice from want of reasonable and probable cause. *10 P. 842=1932 Pat. 117 and 45 B. 227=1921 Bom. 144* followed.

(The Court held that there was positive evidence that defendant wanted to buy plaintiff's house and had uttered threats to plaintiff).

(b) Criminal Procedure Code—abuse of:

To take a dispute of a Civil nature to a Criminal Court was an abuse of a Criminal procedure.

Mr. Daya Shanker Bhargava—for Appellant.
Mr. Kaushal Das Deedwania—for Respondent.

* * * * *

(2)

Dr. Amba Lal Versus. *Crown.*

Application under Sec. 23 (2) of the Indian Press (Emergancy Power) Act XXIII of 1931, decided on February 19, 1934.

Interpretation of Statute:

It is a sound principle of interpretation that words should be given their ordinary meaning unless to do so would make one part of the Act inconsistent with another or would lead to absurdity.

Mr. Daya Shanker Bhargava—for Applicant.
Mr. Madan Mohan Kaul—for Crown.

* * * * *

(3)

Nand Ram. Versus. *Ram Bilas.*

Small Cause Court Revision No. 10 and 11 of 1934, decided on February 22, 1934.

Interest—when to be awarded—in suit for rent.

Suit for recovery of arrears of rent. Where no contract to pay interest, the mere fact that money is due from one party to another is not a ground for awarding interest.

Mr. Sri Kishan Agarwal—for Applicant.

Mr. Jasoda Nandan Bhargava—for Opposite Party.

* * * * *

(4)

Ghasi Ram. Versus. *Badulla and Gulab.*

Execution second Appeal No. 6 of 1934, decided on February 23, 1934, against Execution appeal No 100 of 1931.

Civil Procedure Code—Sec 100—O 41, R. 22—varying order of costs of trial Court in absence of appeal or Cross-objections:

Trial Court orders each party to bear its own costs. The lower appelate Court's order is, 'I dismiss the appeal with costs in both courts'.

Held, This is a slip. If an appeal is dismissed the order of the Court below, including its order for costs, stands. That order can only be set aside on appeal or cross-objection.

Mr. Abdul Qadir Beg.—for Appellant.

Mr. Abdul Rashid.—for Respondents.

* * * * *

(5)

Kishan Lal. Versus. *Firm Ram Dayal Khajulal.*

Small Cause Court Revision No. 17 and 34 of 1934 decided on February 27, 1934.

Provincial Small Cause Court Act—Issues—Evidence:

The points for decision were perhaps not happily framed, but in a Small Cause Court suit, where issues are not framed before hearing, parties must have their evidence ready to support their case.

Sales of Goods Act Sec 42—burden of proof:

When a defendant takes delivery, he is bound to prove that he had intimated his rejection within reasonable time. What is reasonable time is a question of fact.

Pleading—Interest—New case:

In plaint, interest claimed by way of damages and mercantale usage not set up. In cross examination, defendant admitted that interest was usually charged in sugar trade. Held plaintiff cannot be allowed to change his course of action.

Mr. Shyam Swaroop Mathur—for applicant.

Mr. Hem Chandra Sogani—for Opposite Party.

* * * * *

(6)

Kishen Lal. Versus. *Moti Lal and others.*

Second appeal No. 42 of 1933, decided on February 27, 1934, against the decree, dated June 16, 1933, passed by the Additional District Judge.

Pleading—Construction:

Pleadings specially in the mufassal, should not be construed too narrowly.

Transfer of Property Act – Sec: 55 (1—a)—seller bound to disclose material defect.

The seller is bound to disclose to the buyer any material defect in his title, and failure to do so is, under the concluding words of the Section, fraud. The minor's title to a share in the property is a material defect in the title of the seller. If there is reasonable possibility of litigation in connection with property the buyer is certainly entitled to be put in possession of full information on the point at the time of contracting.

Mr. Moti Lal Malayvar—for Appellant.

Mr. Mohan Lal Capoor—for Respondents.

* * * * *

(7)

Mst. Ganeshi. Versus. *Kamar.*

Second Appeal decided on March 2, 1934, against the decree in appeal No. 41 of 1933.

Transfer of Property Act—Sec. 116—assent presumption—finding of fact:

(*i*) To constitute a tenant holding over there must be assent on the part of the lessor.

(*ii*) Whether there was such assent or not is a question of fact.

(*iii*) Assent cannot be presumed from a continuance of possession, *1933 Pat. 485 referred.*

Mr Jasoda Nandan Bhargava.—for Appellant.

Mr. Sri Kishan Agarwal.—for Respondent.

In the High Court of Judicature at Allahabad.

BEFORE MUKERJI AND YOUNG JJ.

Alley Rasul Ali Khan and others.

Judgment-Debtors, Applicants.

Versus.

Bal Kishan and others ... Decree-holders, Opposite-Parties.

Miscellaneous Civil Reference No. 605 of 1933, decided on March 8, 1934, from order of Commissioner and District Judge, Ajmer-Merwara.

(a) Ajmer Courts Regulation (1 of 1877)—S. 17—scope.

A reference is permitted under Sec. 17 when a question of law or usage having the force of law, or the construction of any document, or the admissibility of any evidence affecting the merits of the case arise and not otherwise.

(b) Ajmer Courts Regulation (I of 1877)—S. 17—scope.

Section 17 mentions "the construction of any document" and not of any "documents."

(c) Ajmer Courts Regulation (I of 1877)—S. 17—construction of document is question of law—Inference to be drawn from a number of documents is question of fact.

The question of the construction of certain documents is a question of law but the question what legal inference may be drawn from a number of documents is a question of fact and not a mere question of law, *1923 P. C.* 187 followed.

(d) Ajmer Courts Regulations (I of 1877)—S. 18—scope

If the District Judge thinks that he should make a reference, he should state the facts which he finds as a court of appeal and then should state the question of law that he desires to be decided by the High Court.

(e) Practice—New act passed subsequent to filing of suit—Appeal governed by old Act unless new Act expressly provides to the contrary.

An appeal is a mere continuance of the original proceeding initiated by the filing of the plaint. The right to continue that proceeding by way of an appeal cannot be affected by a new Act, unless it expressly so provides: 192[illegible] All 437 (F. B.) = 50 A. [illegible]3, followed.

(THE FULL TEXT OF THE JUDGMENT IS PRINTED AT A. I. R. 1934 ALLAHABAD 70[illegible])

NOTIFICATIONS.

1. Law Reports.

Circular issued by Mr. D. R. Norman, I. C. S. Judicial Commissioner, Ajmer-Merwara:—

"The Judicial Commissioner has noticed that his circular No 986-1006 dated 25th August 1930 is not strictly observed but that unofficial reports in particular the A. I. R. are frequently cited. He is however aware that the A. I. R. is taken in by most members of the Bar, and he does not wish to prohibit its use entirely. At the same time section 3 of the I. L. R. Act which prohibits a Court from treating as a binding authority any report other than those published under the authority of Government, cannot be entirely ignored. The Judicial Commissioner moreover considers that the only authorised law reports are the I. L. R. the Sind L. R and the A. M. L J. But while an unofficial report of a decision cannot be accepted as a binding authority, counsel is fully entitled to ask the Court to adopt the reason set out in the decision. It may therefore be cited when the facts of the case are analogous to the facts in the case before the Court, unless the judgment contains no reasons for the decision. But it is not permissible to refer for general propositions of law to an unauthorised report of a case in which the facts are not analogous

The Judicial Commissioner trusts that counsel will in future carry out the spirit as well as the letter of this circular.

Circular No. 986-1006 dated the 25-8-30 is cancelled."

---

2. Vakalatnama and Memorandum of appearance.

After hearing Mr. Mohan Lal Capoor, as representing the Bar Association, and giving his reasons Mr. D. R. Norman, I. C. S. Judicial Commissioner, issued a memorandum, dated August 4, 1934, by which he **ruled** as under :—

(1) A Pleader acting or pleading for a party in a criminal case must file a vakalatnama. If however the pleader is merely engaged to plead and his client is present no vakalatnama is necessary.

(2) A memorandum of appearance filed by pleader engaged for the purposes of pleading only under order 3 rule 4 (5) does out require stamp, but is of no effect unless the party himself is present in person or by recognised agent or by a pleader appointed under rule 4 (1).

(3) A vakalatnama once presented in a civil suit continues in force in the court of the Judicial Commissioner as regards all proceedings in the suit without Additional Court fee.

3. Mukhtars.

Notification No. 1097, dated September 19, 1933, published in the Gazette of India, Part II-A at page 681, issued by the Judicial Commissioner, Ajmer-Merwara.

In exercise of the powers conferred by sec. 125 of the Code of Civil Procedure (Act V of 1908), the Judicial Commissioner, Ajmer-Merwara, is pleased to apply to the Province of Ajmer-Merwara the following Rule made by the High Court of Bombay with effect from *1st November 1933.*

For order 3, Rule 2 (a), the following rule shall be substituted:—

(a) "Persons holding general powers of attorney *from parties not resident with in the local limits of the Jurisdiction of the Court within which the appearance, application or act is made or done,* authorising them to make and do such appearances, applications and acts on behalf of such parties."

(NOTE BY THE EDITOR —Order 3, R. 2 of the code of Civil Procedure read as follows before the amendment:

2. The recognised agents of parties by whom such appearances, applications and Acts may be made or done are:—

(*a*) Persons holding powers of attorney authorising them to make and do such appearances, applications and acts on behalf of such parties,

(*b*) ....

By the amendment, the words in italics have been introduced between 'attorney' and 'authorising'.)

COMMITTEE.

---

1. Mr. Suresh Chandra Mahresh.
2. Mr. Bridhi Chand Lakhotia.
3. Mr. Hira Lal Jain.

The Head notes for the first six cases in this Part are by Mr. Mohan Lal Capoor.

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1934 Ajmer-Merwara Law Journal—Part II.

SUBJECT INDEX.

(*Indicates that the judgment is not printed but only the* Law point, *arising in it, is published.*)

Civil Procedure Code.

Civil Procedure Code (contd.)

defendants 2-4 from liability is to increase the liability of defendant No. 1 as he will not able to ask for contribution. As defendant No. 1 alone preferred an appeal, it was not open to lower appellate court to modify the decree to his disadvantage.

SARFARAZALI (MIR) vs. MUZAFFAR HUSSAIN (SYED) 37

—If the trial court rejects a plaint under O. 7, R. 11 (*a*), C. P. C. the appellate Conrt should not dismiss the suit in the absence of cross-objections.

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SARFARAZALI (MIR) vs. MUZAFFAR HUSSAIN (SYED). 37

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—Practice—*Duty of Magistrates during examination of witnesses*—It is the duty of the magistrate to see that the prosecutor puts the proper questions to witness and if necessary to supplement them. When no vernacular record is kept, the magistrate must record every thing that is said, so long at it is relevant and should read out each sentence as he records it. Unless counsel know what has been recorded they cannot examine and cross-examine intelligently.

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—S. 34—*Corroboration*—There is no rule of law that the evidence of a party or his servant cannot be sufficient corroboration of regular accounts. In cases where it is possible to get independant evidence, an inference adverse to a party may legitimately be drawn if he fails to produce it.

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*FATEH CHAND VS. DISTRICT NAZIR. 47

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—S. 5—*Review*—Review application, if bona-fide, is a good ground of excusing limitation.

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—Gift—Though an instrument is not necessary for the validity of a Mohammedan gift, yet if there is an instrument it must be registered.

*ABBAS ALI VS. AKBAR ALI. 47

Partnership Accounts:

—**when lies without a prayer for dissolution**:—There is no absolute rule that a suit for partnership accounts will not lie without a prayer for dissolution. When a partner withholds the annual profits of a concern from a member of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits without a claim for dissolution.

*MOOL CHAND VS. BALU RAM.

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—*Agricultural leases*—In the absence of proof of any settled custom to the contrary, six months' notice, is usually held to be necessary for their determination.

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—S. 116—*Surety when holding over*—A tenant holds over when he remains in possession and the lessor accepts rent from him or otherwise assents to his possession It is essential for the plaintiff to show that defendant had remained in possession after the expiry of the period covered by the rent note

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*ANTHONY VS. NATHMAL. **49**

Waqf Act:

—S. 2 (c)—*Furnishing accounts*—A person who retains certain funds of the waqf in his hands and continues to collect certain rents is a person for the time being administering waqf property and is bound to furnish accounts.

ABDUL LATIF (SETH) VS. WILAYAT HUSSAIN. **43**

follows from this that a party to the suit cannot be added by a compromise.

4. I allow the application, and set aside the order of the lower Court amending the decree. Applicant must get his costs, but as he has not appeared by counsel, pleader's fee will not be included in the bill.

Application allowed.

BEFORE MR. D. R. NORMAN, I. C. S.

Mohan Lal .... Appellant.

Versus.

Khem Chand .... Respondent.

Order in Second appeal No. 60 of 1933 passed on February 8, 1934.

(a) Civil Procedure Code—Sec 114 and O. 47, rule 1—Decree ambiguous:

When the meaning of the decree is doubtful, review is proper remedy.

(b) Limitation Act—Section 5 — Review

Review application, if bona fide, is a good ground of excusing limitation.

Mr. Swarup Narain Agarwal—for Appellant.

Mr. Jasoda Nandan Bhargava.—for Respondent.

Order.—The point for decision is whether limitation should be excused under Sec 5 of the Act. The ground put farward for excusing it is that appellant had presented a review application. This is a good ground if the application was bona-fide i.e. if there were reasonable grounds for it.

2. I consider that there were reasonable grounds The trial Court dismissed plaintiff-respondent's suit with costs for want of jurisdiction. On appeal by plaintiff the learned

Additional District Judge set aside the decree and made the following order :—

> "And I therefore accept the appeal with costs, set aside the decree of the Court below and direct that the plaint be returned to the plaintiff to be presented in the proper Court."

It is not clear from this order whether the Additional District Judge really meant to award plaintiff costs in the trial Court as well as in the appellate Court. A party is entitled to a clear and unambiguous decree and it is the duty of the Courts to draw one up When the meaning of the decree is doubtful I think a review is proper remedy.

3. The appeal is admitted No order as to costs on the application under Section 5.

Appeal admitted.

BEFORE MR D. R. NORMAN, I.C S.

Mangi Lal ....Applicant.

Versus.

Mst: Husani .... Opposite Party.

Small Cause Court Revision No 167 of 1933, decided on February 13, 1934, against the judgment, dated August 10, 1933, passed by the Judge, Small Cause Court, Ajmer, in suit No. 1161 of 1933.

(a) Evidence Act—Sec: 34—What is sufficient corroboration of regular accounts ?

There is no rule of law that the evidence of a party or his servant cannot be sufficient corroboration of regular accounts. In cases where it is possible to get independant evidence, an inference adverse to a may legitimately be drawn if he fails to produce it.

(b) Provincial Small Cause Court Act—Sec. 25—mistake of law—interference with findings of fact

Misdirection by a judge amounts to a mistake of law.

Mr. Sri Lal Agarwal—for applicant.
Mr. C. Jacob—for Respondent.

Judgment.—This is a very common type of case. Plaintiff filed a suit for the recovery of the price of cloth supplied at various dates and interest. Defendant denied any dealings with plaintiff. Plaintiff produced regularly kept accounts and the evidence of his Munim who actually sold the cloth and wrote the accounts and of another shop servant who saw defendant buying cloth on some occasions. Defendant gave evidence denying the transactions. The trial judge dismissed the suit on the ground that there was no independant evidence of the transactions.

Now this Court is always extremely reluctant to interfere with the finding of a Small Cause Court on fact. But in this case I think the judge has misdirected himself and that amounts to a mistake of law. There is no rule of law that the evidence of a party or his servant cannot be sufficient corroboration of regular accounts. In case where it is possible to get independant evidence, an inference adverse to a party may legitimately be drawn if he fails to produce it. But it is obvious that a shop-keeper doing daily business cannot produce any evidence other than that of himself, or his [illegible]ants, corroborated by accounts. If the principle on wh[illegible] trial judge has proceeded [illegible] result will b[illegible] ordinary retail shop[illegible] [illegible]t either ceas[illegible] or take a signature [illegible] [illegible]chaser, dishonest customer [illegible] is to [illegible] Now to stop selling [illegible]ould a[illegible] people, and when [illegible] is [illegible] signature is not approp[illegible]

I do not of course suggest that the word of a shop-keeper must always be taken If it is not supported by regularly kept accounts, ordinarily it should not, and if the accounts are such as could be written at any time e.g. a khata unsupported by a day book the Court would certainly be entitled to hold that they are not sufficient corroboration. Again in some cases the demeanour of the defendant may be such that his evidence carried conviction or he may be able to establish a motive for filing a false suit. Each case must be decided on its merits and all that I want to put forward here is that the mere absence of evidence other than that of the plaintiff or his servants is not, if the latter evidence is suported by properly kept accounts, a good ground for nonsuiting the plaintiff.

In the present case the accounts are in regular form and the Munim has scarcely been cross examined at all. Defendant says she does not even know plaintiff. It is highly unlikely that plaintiff would file an entirely false claim against a person whom he does not know at all. The Munim's evidence as regards the actual sales must therefore be accepted. But as the alleged agreement to pay interest depends on the uncorroborated statement of a single witness, I am unable to accept it. I set aside the decree of the trial Court and award plaintiff a decree for Rs. 60/- with two third costs in both Courts. Future interest on Rs. 60/- at 6% from date of suit is also awarded.

Application accepted.

(b) Provincial Small Cause Court Act—Sec 25—mistake of law—interference with findings of fact

Misdirection by a judge amounts to a mistake of law.

Mr. Sri Lal Agarwal—for applicant.

Mr. C. Jacob—for Respondent.

Judgment.—This is a very common type of case. Plaintiff filed a suit for the recovery of the price of cloth supplied at various dates and interest. Defendant denied any dealings with plaintiff. Plaintiff produced regularly kept accounts and the evidence of his Munim who actually sold the cloth and wrote the accounts and of another shop servant who saw defendant buying cloth on some occasions. Defendant gave evidence denying the transactions. The trial judge dismissed the suit on the ground that there was no independant evidence of the transactions.

Now this Court is always extremely reluctant to interfere with the finding of a Small Cause Court on fact. But in this case I think the judge has misdirected himself and that amounts to a mistake of law. There is no rule of law that the evidence of a party or his servant cannot be sufficient corroboration of regular accounts. In case where it is possible to get independant evidence, an inference adverse to a party may legitimately be drawn if he fails to produce it. But it is obvious that a shop-keeper doing daily business cannot produce any evidence other than that of himself, or his servants, corroborated by accounts. If the principle on which the trial judge has proceeded is upheld the result will be either that the ordinary retail shop-keeper must either cease to sell on credit, or take a signature for every purchaser, otherwise all that a dishonest customer has to do is to deny the transaction. Now to stop selling on credit would adversely affect poor people, and when one's clientele is mainly illiterate to take signatures is not a practicable proposition.

I do not of course suggest that the word of a shopkeeper must always be taken If it is not supported by regularly kept accounts, ordinarily it should not, and if the accounts are such as could be written at any time e.g. a khata unsupported by a day book the Court would certainly be entitled to hold that they are not sufficient corroboration. Again in some cases the demeanour of the defendant may be such that his evidence carried conviction or he may be able to establish a motive for filing a false suit. Each case must be decided on its merits and all that I want to put forward here is that the mere absence of evidence other than that of the plaintiff or his servants is not, if the latter evidence is suported by properly kept accounts, a good ground for nonsuiting the plaintiff.

In the present case the accounts are in regular form and the Munim has scarcely been cross examined at all. Defendant says she does not even know plaintiff. It is highly unlikely that plaintiff would file an entirely false claim against a person whom he does not know at all. The Munim's evidence as regards the actual sales must therefore be accepted. But as the alleged agreement to pay interest depends on the uncorroborated statement of a single witness, I am unable to accept it. I set aside the decree of the trial Court and award plaintiff a decree for Rs. 60/- with two third costs in both Courts. Future interest on Rs. 60/- at 6% from date of suit is also awarded.

Application accepted.

BEFORE MR. D. R. NORMAN, I. C. S.

Mirza Ahduddin Beg .... Defendant Appellant.

Versus.

Syed Mazdar Ali .... Plaintiff-Respondent.

Second appeal No. 52 of 1933 decided on February 19, 1934, against the decree passed by the Special Additional District Judge, on September 13, 1933, in appeal No. 79 of 1933.

(a) Civil Procedure Code—Section 100—Second appeal—question of fact—when can be re-opened.

Question of fact which ordinarily cannot be re-opened in second appeal may be re opened when judge has misdirected himself on the point

Civil Procedure Code—Sec. 35—Costs—Quantum in suit for damages.

In suits for damages it is usual, unless the amount of damages has been deliberately exaggerated to increase the costs, to award full costs to a successful plaintiff even though the amount claimed may not be awarded in full.

Damages—for defamatory book—Quantum.

When plaintiff suffered no special damages on publication of defamatory matter, nominal damages are sufficient.

Mr. Jasoda Nandan Bhargava—for Appellant.

Mr. Abdul Rashid—for Respondent.

Order.—This second appeal arises out of a suit for defamation. Plaintiff claims to be a lineal descendant of one Shah Abululla. He alleged that defendant had written a book containing passages which were defamatory of him and claimed Rs. 500/- damages. The trial Court held that the plaintiff had not proved that he was the descendant of Shah Abululla On appeal the learned Special Additional District Judge held that plaintiff had proved that he was the descendant of Shah Abululla; and that three passages in the book (Exs. P/2, P/4 and P/6) were aimed at the plaintiff and were defamatory. He further held that plaintiff had suffered

no special damage, and he therefore awarded nominal damages only namely Rs. 20/- and costs in proportion.

2. In second appeal two points are taken:—

(1) That plaintiff is not proved to be a lineal descendant of Shah Abululla.

(2) That Exs. P/3, P/4 and P/6 are not defamatory and are not aimed at the plaintiff.

3. The first point is a question of fact, which ordinarily cannot be re-opened in second appeal. But Mr. Jasoda Nandan claims to re-open it on the ground that the learned Special Additional District Judge has misdirected himself on the point. The words complained of run as follows.—

> "I therefore hold that it has been sufficiently proved for the purposes of this case that the plaintiff is a lineal descendant of Shah Abululla. The present is not a suit for the declaration of his status by the plaintiff and it is therefore not necessary to go in to the matter further".

I agree that this amounts to misdirection. Plaintiff either is or is not the descendant of Shah Abululla, and the purpose for which his descent is to be established cannot affect the quantum of evidence necessary for establishing it. If I held that the question of plaintiff's descent is really a relevant one I should either have to remand the case or go into the question myself.

4 But in my view the point is not relevant It is clear from the passages in the book referred to that they are aimed not at the descendants of Shah Abululla but at persons who claim, in the opinion of the writer falsely, to be such descendants. It was probably this aspect of the case that the Special Additional District Judge had in mind when he held plaintiff's descent sufficiently proved for the pur-

of the case. All therefore that was necessary for the plaintiff to prove was that at the time when the book was written he was claiming to be a descendant of Shah Abululla Now the learned Special Additional District Judge has found as a fact, vide paragraph 10 of his judgment, that defendant's book was published after the plaintiff had brought to the defendant's notice his claim to be a descendant of Shah Abululla.

5. On the second point I have nothing to add to the judgment of the learned Special Additional District Judge. In paragraph 7 he has set out the defamatory portions of Exs. P/3, P/4, P/6 and I agree with him that the expressions used are defamatory.

6. The appeal therefore fails and is dismissed with costs.

7. The plaintiff has filled cross-objections on the ground that he should have been allowed full damages. In view of the fact that he suffered no special damage, I am not inclined to interfere with the amount awarded by the learned Special Additional District Judge but I think the order as to costs was wrong In a suit for damages it is usual, unless the amount of damages has been deliberately exaggerated to increase the costs, to award full costs to a successful plaintiff even though the amount claimed may not be awarded in full. I therefore modify the decree of the lower appellate Court by awarding plaintiff his full costs in both the Courts below. No order as to costs on cross-objections.

Appeal dismissed.

BEFORE MR. D. R. NORMAN, I. C. S.

Mir Sarfaras Ali .... Defendant (I) Appellant.

Versus.

(1) Syed Muzaffar Hussain. .... Plaintiff-Respondents.

(2) Siraj Ahmed. (3) Riyaz Ahmed and (4) Mir Mardan Ali .... Defendant 2-4 Respondents.

Second appeal No. 65 of 1933, decided on February 20, 1934, against the decree, dated September 29, 1933, passed by the Special Additional District Judge in Appeal No. 25 of 1934.

(a) Civil Procedure Code—O 41, R. 22—Modification of decree to appellant's disadvantage.

The trial court passed a decree against four defendants. Only defendant No. I appealed. Lower appellate court held that Defendent No. I alone was liable.

Held, The effect of freeing defendants 2-4 from liability is to increase the liability of defendant No. I as he will not able to ask for contribution As defendant No. I alone preferred an appeal, it was not open to lower appellate court to modify the decree to his disadvantage.

(b) Contract Act—Section 45—presumption.

While the presumption is that the promisees are joint, there is no bar in law to their rights being several By filing a suit alone plaintiff impliedly asserts that the contract was several.

(c) Transfer of Property Act—Sec: 106—Notice for agricultural leases.

Although Section 106 of the Transfer Property Act does not strictly apply to agricultural leases, yet in the absence of proof of any settled custom to the contrary, six months notice is usually held to be necessary for their determination.

Mr. Swarup Narain Agarwal—for Appellant.

Mr. Gajendra Nath Bhargava—for Respondent.

Order—Plaintiff is a co-sharer in the Nandla Jagir. In 1887 he and other co sharers leased their right to collect hasil to one Yesuf Ali, the father of defendant No. 1. Accord-

of the case. All therefore that was necessary for the plaintiff to prove was that at the time when the book was written he was claiming to be a descendant of Shah Abululla Now the learned Special Additional District Judge has found as a fact, vide paragraph 10 of his judgment, that defendant's book was published after the plaintiff had brought to the defendant's notice his claim to be a descendant of Shah Abululla.

5. On the second point I have nothing to add to the judgment of the learned Special Additional District Judge. In paragraph 7 he has set out the defamatory portions of Exs. P/3, P/4, P/6 and I agree with him that the expressions used are defamatory.

6. The appeal therefore fails and is dismissed with costs.

7. The plaintiff has filled cross-objections on the ground that he should have been allowed full damages. In view of the fact that he suffered no special damage, I am not inclined to interfere with the amount awarded by the learned Special Additional District Judge but I think the order as to costs was wrong In a suit for damages it is usual, unless the amount of damages has been deliberately exaggerated to increase the costs, to award full costs to a successful plaintiff even though the amount claimed may not be awarded in full. I therefore modify the decree of the lower appellate Court by awarding plaintiff his full costs in both the Courts below. No order as to costs on cross-objections.

Appeal dismissed.

BEFORE MR. D. R. NORMAN, I. C. S.

Mir Sarfaraz Ali .... Defendant (I) Appellant.

Versus.

(1) Syed Muzaffar Hussain. .... Plaintiff-Respondents.

(2) Siraj Ahmed. (3) Riyaz Ahmed and (4) Mir Mardan Ali .... Defendant 2-4 Respondents.

Second appeal No. 65 of 1933, decided on February 20, 1934, against the decree, dated September 29, 1933, passed by the Special Additional District Judge in Appeal No. 25 of 1934.

(a) Civil Procedure Code—O 41, R. 22—Modification of decree to appellant's disadvantage.

The trial court passed a decree against four defendants. Only defendant No. I appealed. Lower appellate court held that Defendent No. I alone was liable.

Held, The effect of freeing defendants 2 4 from liability is to increase the liability of defendant No I as he will not able to ask for contribution As defendant No I alone preferred an appeal, it was not open to lower appellate court to modify the decree to his disadvantage

(b) Contract Act—Section 45—presumption.

While the presumption is that the promisees are joint, there is no bar in law to their rights being several By filing a suit alone plaintiff impliedly asserts that the contract was several.

(c) Transfer of Property Act—Sec. 106—Notice for agricultural leases.

Although Section 106 of the Transfer Property Act does not strictly apply to agricultural leases, yet in the absence of proof of any settled custom to the contrary, six months notice is usually held to be necessary for their determination

Mr. Swarup Narain Agarwal—for Appellant.

Mr. Gajendra Nath Bhargava—for Respondent.

Order—Plaintiff is a co-sharer in the Nandla Jagir. In 1887 he and other co-sharers leased their right to collect hasil to one Yesuf Ali, the father of defendant No. I. Accord-

ing to plaintiff Yusuf Ali took the lease not only on behalf of himself, but also on behalf of the predecessors in title of defendants Nos 2 to 4. The suit out of which this appeal has arisen was for plaintiff's share of the hasil for the three years 1927, 1928 and 1929. Defendants No 4 did not appear. Defendants No. 2 and 3 admitted the claim. Defendant No. 1 contested it The trial court passed a decree for Rs. 54/-. On appeal by defendant No. 1, the Special Additional District Judge reduced the amount to Rs. 39-14-6 but held that defendant No 1 was alone liable.

2. Three points are taken in second appeal:

(1) Plaintiff is a joint promisor and as such is not competent to sue alone.

(2) It was not open to the lower appellate court to increase the liability of defendant No. 1 by freeing the other defendants from liability.

(3) The contract was terminated by notice dated the 20th March, 1927.

My findings are:

(1) Plaintiff was competent to sue alone.

(2) The lower appellate court could not so modify the decree.

(3) The notice was valid and terminated the contract as regards the years 1928 and 1929.

3. On the first point Mr. Gajendra Nath for plaintiff argues that non-joinder must be pleaded at the earliest opportunity. Mr. Swaroop Narain replies that where plaintiff is entirely incompetent to sue no decree can be passed in his favour. Whether plaintiff was or was not competent to sue alone depends on the terms of the contracts. While the presumption is the promisees are joint there is no bar in law to their rights being several. By filling this suit alone plaintiff impliedly asserted that the contract was several.

Defendant No. 1 not having denied this in the trial Court cannot do so now.

4. On the second point the plaintiff supports the appeal. The effect of freeing defendants 2 to 4 from liability is to increase the liability of defendant No. 1 as he will not be able to ask for contribution. As defendant No. 1 alone preferred an appeal it was not open to the lower appellate Court to modify the decree to his disadvantage.

5 Both the Courts below held that the notice was invalid because it was served on the plaintiff alone and not on his co-sharers. But if the contract was several, and this is the only basis on which the plaintiff could sue alone, then a notice to him would terminate the contract in so far as it was with him. Mr. Gajendra Nath has very fairly conceded this point.

6. He argues however that the notice does not purport to terminate the contract. The notice is not well expressed but reading it as whole I think there is a clear intention to terminate the contract. It is true that defendant No. 1 therein states that he will continue to collect hasil but as he was himself a co-sharer he has a right to do so. I therefore hold that this notice determines the contract.

7. The date of the notice is 20th March, 1927. Hasil was payable on the 1st June in each year. Although Section 106 of the Transfer of *Property Act does not strictly apply* to agricultural leases yet in the absence of proof of any settled custom to the contrary six months notice is usually held to be necessary for their determination. It follows that the notice was effectual for the years 1928 and 1929 only.

8. There will thus be a decree for hasil for the year 1927 namely Rs. 13-5-0. The decree will be against all the defendants. Plaintiff to get 1/3 of his costs throughout and defendant No. 1 to get 2/3 of his costs. The other defendants will bear their own costs.

Decree Modified

BEFORE MR. D. R. NORMAN, I. C. S.

Sirajuddin .... Defendant No. 2, Applicant.

Versus.

Chitar Mal .... Plaintiff-Opposite Party.

Small Cause Court Revision No. 16 of 1934, decided on February 23, 1934, against the judgment, dated November 28, 1933, passed by the Small Cause Court, Ajmer, in suit No. 2618 of 1933.

Transfer of Property Act—Sec 116 – surety when holding over.

A tenant holds over when he remains in possession and the lessor accepts rent from him or otherwise assents to his possession. It is essential for the plaintiff to show that defendant had remained in possession after the expiry of the period covered by the rent note.

Transfer of Property Act—Sec 106—Notice.

Rent note for a definite period. No notice necessary by tenant that he had discontinued possession.

Mr. Ballabh Das Khanna.—for Applicant.

Mr. Sri Lal Agarwal.—for Respondent,

Order.—Plaintiff filed a suit against two persons for rent accruing for 15 months in the years 1931 and 1932. The defendants had taken a 3 years' lease of the property from 1921 and plaintiff's case was that they were tenants holding over. Defendant 1 pleaded that he had vacated the house in March 1931. Defendant 2 pleaded that he was merely a surety and had never had possession, in which plea defendant 1 supported him. The trial Court passed a decree against both of them, and defendant 2 has applied in revision.

The application must succeed. The trial Judge has remarked that it is immaterial whether defendant [illegible] as or was not in possession of the house. This would [illegible] as regards the period covered by [illegible] rent note, [illegible] for the subsequent period. A [illegible] holds [illegible]

remains in possession and the lessor accepts rent from him or otherwise assents to his possession (Section 116 of the Transfer of Property Act). It was therefore essential for plaintiff to show that defendant 2 had remained in possession after the expiry of the period covered by the rent. On the evidence led in the case I hold that he has failed to establish this and it cannot be inferred that because one co-tenant holds over the other does so too. It is argued that defendant 2 gave no notice to plaintiff that he had discontinued possession, but as the rent note was for a definite period he was not bound to do so.

I allow the application and set aside the decree of the trial Court so far as it is against defendant 2 with costs in both Courts.

Application accepted.

BEFORE MR. D. R NORMAN, I. C. S.

Yusuf Khan and others.--Judgment debtors-Applicants.

Versus.

Madar Bux .... Decree Holder-Opposite party.

Small Cause Court Revision No. 22 of 1934 decided on March 7, 1934, against judgment, dated January 15, 1933 passed by Judge, Small Cause Court, Ajmer, in Execution case No. 2694 of 1933

Provident Funds Act—Sec. 3 (2)—Provident Fund money in the hands of "dependant' not attachable.

Applicants' father was a depositor in a Provident Fund. Applicants were his nominees. Execution sought against money which stood to his credit.

Held. the applicants take the money free from any debt incurred by their deceased father, 1931 Mad. 797 *not Applicable.*

Mr. Milap Chandra Chhabra.—for Applicant.

Mr. Sham Sunder Bhargava.—for Opposite Party.

BEFORE MR. D. R. NORMAN, I. C. S.

Firm Har Lal Rikhab Das.... .... Plaintiff-Applicant.

Versus.

Kesri Mal .... Defendant-Opposite party.

Small Cause Court Revision No. 176 of 1933, decided on March 12, 1934, against the judgment, dated June 30, 1933, passed by judge Small Cause Court, Beawar, in suit No. 1101 of 1931.

Civil Procedure Code—Section 20 (c)—Jurisdiction.

The general rule, that the debtor is bound to make payment where the creditor resides, does not apply when the creditor lives outside the realm, *I. L. R. 53 C. 88* **Followed.**

Mr. Jyoti Swarup Gupta—for Applicant.

Mr. Moti Prasad Mehra—for Opposite-party.

Order.—This application raises a question of jurisdiction. The suit is on a khata baqi which the trial Court has held to have been executed in Udaipur State. Defendant resides in Udaipur State. The trial Court held that it had no jurisdiction. This decision is attacked on the ground that part of the cause of action arose within British India both because of the general rule that the debtor is bound to make payment where the creditor resides and because the intention of the parties that payment should be made in British India is proved.

On the first point the trial Court relying on *Bansilal Abirchand V. Gulam Mahbub Khan*[1] held that the general rule does not apply when the creditor lives outside the realm. That is a decision of the Privy Council and concludes the point. It is urged that the remarks relied on by the trial Court are obiter, but in my judgment they were not. There

(1) 53 Cal 88=1925 P. C. 290.

the creditor who resided in Secunderabad sued a resident of Hyderabad (Deccan) in a Secunderabad Court. The contract was made in Hyderabad. The plaintiff invoked the rule that a debtor must seek out his creditor and the Privy Council rejected his argument. The case is an exact parallel.

3. The plaint did not set out an agreement to pay the money in British India and the point was not in issue in the trial Court. It is a point of fact and cannot be raised in revision.

4. The application fails and is dismissed with costs.

Application rejected.

Law Points in Certain Cases.

**Abbas Ali* Versus *Akbar Ali.*

Civil Second appeal No. 4 of 1934 decided on March 5, 1934.

Mohamedan Law—gift—whether registration necessary:

Though an instrument is not necessary for the validity of a Mohamedan gift, yet if there is an instrument it must be registered 1927 Cal: 197. diss.

Mr. Jasoda Nandan Bhargava—for Appellant.
Mr. Shiam Sunder Bhargava—for Respondent.

**Tom George* Versus. *Crown.*

Criminal Reference applications Nos. 4, 8 and 10 of 1934 decided on March 14, 1934.

Criminal Procedure Code—Practice—Examination of witness—duty of Magistrates:

It is the duty of the magistrate to see that the prosecutor puts the proper questions to witness and if necessary to supplement them. When no vernacular record is kept the magistrate must record every thing that is said, so long at it is relevant and should read out each sentence as he records it. Unless counsel know what has been recorded they cannot examine and cross-examine intelligently.

R. B. Mithan Lal Bhargava—for Applicant.
K. B. Abdul Wahid Khan—for the Crown.

**Fateh Chand.* Versus. *The District Nazir.*

Civil Revision application No. 27 and 28 of 1934, decided on March 17, 1934.

Guardian and Wards Act—Sec. 22 (2) scope.

(a)—Sub Secton (2) of Section 22 of the Guardian and Wards Act applies to all officers of Government appointed as guardians. The district Nazir is consequently not entitled to receive any fees out of a minor's estate for the work done by him as minor's guardian. *24 B. 95* **Dissented from.**

(b)—District Nazir cannot be appointed guardian in his personal capacity as he is not related or in any way connected with the minor.

Mr. Abdul Rashid—for Applicant.

K. B Abdul Wahid Khan.—for District Nazir.

***Mool Chand** vs. *Balu Ram.*

Second appeal No. 5 of 1934 decided on June 26, 1934, against the decree dated November 20, 1933, passed by the Additional District Judge in Appeal No. 123 of 1932.

Partnership accounts—suit for partnership account—when lies without a prayer for dissolution :

There is no absolute rule that a suit for partnership accounts will not lie without a prayer for dissolution.

When a partner withholds the annual profits of a concern from a member of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits without a claim for dissolution *2 L. 351 = 1922 Lah. 195* **Foll.** *51 M. 671 = 1931 Mad. 300* **Referred.**

Mr. Raghu Nath Agarwal—for the Appellant.

Dr. Kailash Nath Katju (of Allahabad) and

Mr. Debi Narain Simlot—for the Respondent.

**Anthony* vs. *Nath Mal*

Small cause court Revision No. 29 of 1934 decided on June 27, 1934, against the judgment dated January 6, 1934, passed by small cause court, Ajmer, in suit No. 3868 of 1933.

Usurious Loans Act Sec. 3—Application in an ex-parte-suit—Scope.

The court may apply the Act in an ex-parte suit. A rate of 120 % per annum is in itself a sufficient ground for granting relief under the Act.

Mr. Mahadeo Prasad Bhargava—for the Appellant.

Mr. Daya Shanker Bhargava—for Opposite party.

**Misri Lal* vs. *Crown.*

Criminal Revision No. 20 and 25 of 1934 decided on July 2, 1934, against the order of sessions Judge, dated April 13, 1934, in Criminal case No. 56 of 1934.

Evidence Act—Sec. 30—Uncorroborated confession of a co-accused—sufficiency of, for conviction.

A man cannot be convicted on the uncorroborated confession of co-accused.

The confession of one co-accused cannot be corroborated by the confession of another accused *38 B. 156 = 1914 Bom. 305* **Foll.**

K. B. Abdul Wahid Khan—for crown.

**Kishen Chander* and others vs. *Jai Narain* and others.

Second Appeal No 30 of 1934, decided on July 4, 1934, against the decree, dated January 19, 1934, passed by Special Additional District Judge in civil appeal No. 146 of 1933.

Specific Relief Act (1877)—Sec. 55—mandatory injunction—when proper remedy ?

The ordinary rule is that a *mandatory injunction* is a proper remedy against the appropriation of joint property by one joint owner to his exclusive use especially when the appropriation is accompanied by an assertion of exclusive title

Encroachment—what amouut to ?

Construction of a staircase is obviously an encroachment since it diminishes the area of the roof available for use.

Mr. Jasoda Nandan Bhargava—for Appellants,

Mr. Ghisu Lal—for Respondents.

**Ram Bilas* vs. *Ramdev Phul Chand.*

Second Appeal No. 10 of 1934 decided on July 6, 1934 against the decree in Appeal No. 45 of 1933,

Civil procedure Code—O 41, R. 22—Appellante Court cannot modify decree to appellant's detriment in absence of cross-objections.

Suit to set aside a decree on the ground that it was obtained by fraud. Trial Court held that the fraud alleged was not actionable and rejected the plaint under O 7, R 11 (a) C. P. C. Plaintiff appealed. Lower appellate Court, while agreeing with the trial Court's finding that the fraud alleged was not actionable, held that the suit should have been dismissed and amended the trial Court's decree to that extent.

Held, The Lower appellate Court should not modify the trial Court's order to the detriment of the appellant in the absence of cross objections.

Mr. Jyoti Swarup Gupta—for Appellant:

Mr. Kaushal Kishore Bhargava—for Respondent.

**Misri Lal* and others vs. *Chand Mal.*

Second Appeal No. 40 of 1934 decided on July 17, 1934, against the decree, dated March 19, 1934, passed by Special Additional District Judge.

Practice—Admission of document without proof in absence of objection.

When a document which would on proper proof be relevant, is admitted in evidence without such proof, but without objection, no party can afterwards be heard to say that it is inadmissible for want of proof.

Mr. Moti Prasad mehra—for Appellants

Mr. Gajendra Nath Bhargava—for Respondent.

NOTIFICATIONS.

4. Pleaders fee in cases heard by the Judicial Commissioner.

In all cases heard in the Court of the Judicial Commissioner, Ajmer-Merwara, after 1st January 1934, Pleader's fee will be assessed as follows:—

	1st Appeal.	2nd Appeal.
1. *Appeals from decrees in suits.*		
(a) When the value of the appeal does not exceed Rs. 5,000/-	3% on the Valuation.	3% on the Valuation.
(b) When the value exceeds Rs 5,000/ but does not exceed Rs. 20,000 -	3% on Rs. 5,000/- & 1½% on the valuation in excess of Rs. 5,000/-	3% on the Valuation.
(c) When the valuation is fixed by plaintiff under Section 7 (IV) of the Court fees Act or when a fixed fee is payable under Art. 17 of Schedule II of the Court Fees Act.	Rs. 150/-	Rs. 30/-
(d) Minimum fee.	Rs. 150/-	Rs. 30/-
2. *Appeals from orders passed under Section 47, Civil Procedure Code.*		
(a) When the order under appeal completely disposes of the *darkhast* the fee will be calculated on the amount claimed or allowed in *darkhast* on the same scale as in appeals from decrees in suits.		
(b) When the order does not Completely disposes of the *darkhast* the fee will be Rs. 50/- in the 1st Appeal and Rs 30/- in second appeals.	Rs. 50/-	Rs. 30/-
3. *Appeals from orders under O. 43 C P. C.*	Rs. 30/-	
4. *Application for revision*		
(a) Under Sec. 25 of the Small Cause Court Act. As on a second appeal except that the minimum fee will be Rs. 20 -.		
(b) Under Sec. 115 Civil Procedure Code.	Rs. 25 -	

5. *Appeals arising out of applications for probate, letters of administr tion or a Succession Certificate.*

The fee will be calculated on the value of the property at the followin rate :—

2% on the first Rs. 5,000/- and 1% on the balance upto Rs. 20,000/-.

6. *Appeals under the Land Acquisition Act.*

Advalorem on the same scale as for a first appeal with a minim fee of Rs. 50/-.

7. *Applications for review.*

Half the amount allowed on the decree or order sought to be reviewed

8. *Cross-objections.*

The same as if the cross-objections were on appeal.

9. In entering the fee upon the bill of costs fractions of a rupee will b neglected.

10. Fees in any case not falling within the above classes will be at th discretion of the Judicial Commissioner.

11. In any case in which a fee calculated on the above scale appears to b inadequate the Judicial Commissioner will pass special orders

5. Renewal of Pleader's Sanads.

Circular No. 766 issued on May 24, 1934 by the Judicia Commissioner.

"It has been noticed that Pleaders holding annual Sanads in many cases apply for their renewal much after the expiry of the period of the current Sanads. A Pleader whose Sanad has not been renewed is not entitled to appear in any Court. All Pleaders holding annual Sanads are requested, therefore, to present their applications for renewal by 1st December of each year".

6. Limitation for Revision.

Order No. 518-835, dated May 12, 1933, passed by the Judicial Commissioner.

"It has hitherto been the practice in the Judicial Commissioner's Court to admit revision applications preferred six months from the date of the order sought to be revised. The Judicial Commissioner considers that this period is unnecessarily long and propose to reduce it to three months. The reduction will take effect as regards all orders passed after the 30th June, 1933. A copy of this order should be posted in the courts of all Judges and First Class Magistrates, and the members of the Bar are asked to bring it to the notice of their clients".

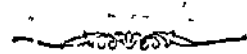
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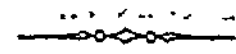
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BEFORE MR. D. R. NORMAN, I.C.S

Debi Singh, Driver. ... . Accused.

Versus.

Crown .... Complainant.

Criminal Reference No. 17 of 1934, decided on June 26, 1934, made by Additional Sessions Judge, in Criminal Revision No. 6 of 1934, decided on April 20, 1934

Penal Code—Section 279—Fast driving.

Mere fast driving does not constitute an offence under section 279. By-standers' estimates of speed are very unreliable.

Criminal Procedure Code—Section 256—Requirements of—Breach—Prejudice.

S. 256 Criminal Procedure Code lays down clearly that the accused shall be called to enter upon his defence after the final cross examination of the Prosecution witnesses.

The probability of the accused being prejudiced by breach of the provisions of S. 256 Cr P C. is so obvious that he is not bound to show special prejudice.

Mr Chand Karan Sarda—for Applicant.

K.B. Abdul Wahid Khan—for Crown.

Order.—This is a reference from the learned Additional Sessions Judge. The material facts are as follows—The accused when driving a motor lorry ran over and killed a dog. The owner complained to the police who sent up a case under Section 279 I.P.C. in the Court of the City Magistrate from which Court it was transferred to Bench A of the Honorary Magistrates. The Magistrates convicted the accused and sentenced him to a fine of Rs. 50/-. The accused applied in revision to Additional Sessions Judge who has referred the case both on the ground of irregularities in the procedure and on the merits.

The complainant lives at Nowshera in the N.W.F.P. and after examination and cross examination before the charge returned there. After the charge was framed the accused applied, as he had a right to do, for his further cross-examinanation. The Magistrate directed a commission to issue for cross-examination. It is argued that this was irregular but I agree with the learned Additional Sessions Judge that it was within the Magistrates' discretion. But then instead of waiting for the return of the commission they directed the accused to lead his defence evidence. This procedure was obviously wrong as Section 256 Cr. P.C lays down clearly that the accused shall be called upon to enter his defence *after the final cross-examination of the prosecution* witnesses.

After defence evidence had been led the arguments were heard and still the commission had not returned. On 31st January 1934 after the case had twice been adjourned for judgment the accused waived his right to cross-examine the complainant. Pronouncement of judgment was however postponed several times and meanwhile the commission had returned and was attached to the record. The accused was not further examined and judgment was pronounced.

The learned Additional Sessions Judge considers that the conviction is bad both because the accused was called upon to enter upon his defence before the prosecution case was closed and because he was not further examined after receipt of the commission As regards the first point I am disposed to agree. As already pointed out there was a clear breach of the provisions of Section 256 and the probability of the accused being thereby prejudiced is so obvious that I do not think he is bound to show special prejudice. But as regards the second point it is not clear that the Magistrates treated the commission as evidence. The accused had waived his right to further cross-examination. The cross-

examination taken on commission is not referred to in the judgment, and though the commission is attached to the record it bears no endorsement under the initials of the Magistrates and is not mentioned in the proceedings sheet.

On the merits I agree with the Additional Sessions Judge that there is no case. Session 279 I.P.C. deals with the offence of driving so as to endanger human life or limb. But the charge runs as follows 'that you were driving a motor-lorry rashly at a high speed causing the death of the dog belonging to the complainant' In accordance with the charge the major portion of the judgment is devoted to considering whether the dog's death was its own fault or not and has no reference to the offence set out in section 279. It is true that at the end of the judgment the Magistrates remark that the accused drove over a cross roads at a excessive speed without sounding his horn and might have collided with cross traffic, had there been any at the time. Apart from the fact that by-standers' estimates of speed are very unreliable and that there is a good deal of evidence that accused was driving slowly, mere fast driving does not constitute an offence under Section 279. It is neither proved that the corner was a blind one, i.e. that there might have been traffic approaching which the accused could not see. Thus on its merits the prosecution fails.

I will add that I consider the police partly responsible for the real point of the case being missed. The challan states that the lorry was being driven rashly and caused death of the dog, but does not show in what way there was any danger to human life or limb. This however does not exonerate the Magistrates from the responsibility of framing a proper charge.

I accept the reference, set aside the conviction and sentence and acquit the accused. The fine, if paid, should be refunded.

Reference accepted.

BEFORE MR. D. R. NORMAN, I.C.S.

Firm Sobha Ram Sri Ram .... Decree Holder-Appellant.

Versus.

Prabhu Lal and another. Judgment debtor. Respondent.

Execution Second Appeal No 48 of 1933, decided on July 9, 1934, against the order passed by Additional District Judge, in Execution Appeal No. 39 of 1931.

Civil Procedure Code—O. 21, Rule 50 (2)—scope of:

The word "is disputed" must be taken to mean "is not admitted"

Civil Procedure Code—O 21, R. 50 (2) and (3)—Ex-parte order passed by one Court cannot be questioned by another Court

Sub Judge, Moradabad, passed a decree in favour of appellant against a firm. Subsequently he granted leave, ex parte to execute the decree against respondents on the ground that they were partners. Appellants sought to execute against Respondents at Ajmer. Respondents denied, at Ajmer, that they were partners.

Held, the respondents could not re-open the question which had been decided by the Moradabad Court.

Courts of concurrent jurisdiction cannot question each other's procedure. When an order under O 21 rule 50 (2) is passed, ex parte, by one Court there is a presumption that it was passed after legal enquiry. *1929 All. 390*, **Distinguished.**

Mr. Hem Chandra Sogani—for Appellant.
Mr. Jasoda Nandan Bhargava—for Respondent.

Order.—The appellant obtained a decree against a firm in the Court of the Sub-Judge, Moradabad. Subsequently he applied to that Court under O. 21, R. 50 (2) for leave to execute the decree against the present respondents on the ground that they were partners. This leave was granted ex-parte, and appellant sought to execute his decree against them in Ajmer. The respondents denied that they were

partners. The Sub Judge held that they could not re-open a question which had been decided by the Moradabad Court. On appeal the Additional District Judge relying on *G. Atherton and Co.* vs. *S. Habib Baksh*[1] held that they could. Hence this appeal.

The circumstances in that case were peculiar. The decree was passed against a firm by the Bombay High Court and an attempt was made to execute it at Jhansi against one Habib Baksh on the ground that he was the legal representative of Rahim Baksh a partner in the firm. It was held that Rahim Baksh was the sole partner in the firm and that he was dead when the decree was passed, and that the decree was thus a nullity. Subsequently the decree-holder obtained ex parte from the Bombay High Court leave to execute against Habib Baksh on the ground that he was a partner. The order of the Bombay High Court did not state under what rule it was passed but the Allahabad High Court took it as an order Or. 21 r 50 (2).

Now obviously the Allahabad High Court could not allow execution of a decree which an Allahabad Court has judicially determined to be a nullity and it seems to me that the case might have been decided on that ground. But instead the learned Judges relied on the wording of O. 21 R. 50 (3) which is as follows: "*where the liability of any* person has been tried and determined under sub rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree." They argued from it that it was only when the liability had been tried or determined in a proceeding in which the person sought to be made a partner had appeared that the order granting leave had the force of a decree.

Now with this line of reasoning I am with all due respect unable to agree. The concluding portion of R. 50 (2) ru

(1) 1920 All 300.

as follows: "or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined". The word 'is disputed' must be taken to mean 'is not admitted' for otherwise the person sought to be made liable could prevent a determination of his liability by the simple expedient of not appearing, and this is obviously absurd. It follows that as an issue in a suit may be determined ex parte there can be a determination within the meaning of r. 50 (2) ex parte.

It appears that in *G. Atherton and Co.* vs. *Habib Baksh* the Bombay High Court had passed its order merely on an affidavit produced by the decree-holder and this may have weighed with the learned Judges since Sulaiman J remarks: 'But an ex parte order passed without the question having been specifically tried and determined has not the force of a decree." If Sulaiman J means that he would regard an ex parte order passed after some evidence had been recorded as conclusive then the present case is, as I shall hereafter show distinguishable. But I am doubtful if that is his meaning, and it would certainly be inexpedient that one Court should be able to examine the procedure of another Court of concurrent jurisdiction and give effect to the orders of the latter Court, only if it approved of its method.

It is argued that the order of the Moradabad Court was a formal one passed without notice to the present respondants and without enquiry. In my opinion that is not so. The order runs as follows: 'Kaloo Ram and Prabhu Lal are absent, they are proved to be the partners of the firm Bakhtawar Mal Mangi Lal against which firm the D.H's decree stands. The D.H. is entitled to take out the execution against these two persons also (vide order 21 rule 50 (2) C.P.C.) Having regard to the maxim: 'Omnia praesumuntur eracta' I think that the mention of Kaloo Ram's and Prabhu Lal's absence shows that notice was issued to them, and the

words 'are proved to be the partners' shows that evidence was recorded. If the respondents contention that they were never actually served is true, their remedy was to move the Moradabad Court to set aside the ex parte proceedings.

It would thus appear from the order that there was a trial and determination in the Moradabad Court. But as I have said before I do not regard this as really material, it is not for Courts of concurrent jurisdiction to question each other's procedure and when an order under r. 50 (2) is passed ex parte there is a presumption that it was passed after legal enquiry.

I allow the appeal, set aside the order of the Additional District Judge and restore that of the Sub Judge with costs throughout.

Appeal allowed.

BEFORE MR. D. R. NORMAN, I.C.S.

**Ghisu Lal* .... Appellant.

Versus

Mst. Goran .... Respondant.

Second Appeal No. 15 of 1934, decided on July 9, 1934, against the decree, dated November 24, 1933 passed by the Special Additional District Judge in Appeal No 89 of 1933.

Transfer of Property Act—Sec. 59.—Can relationship of mortgagor and mortgagee be created without a registered document on the doctrine of part performance.

A mortgage for a sum exceeding Rs. 100 can only be effected under Section 59 of the Transfer of Property Act by a registered instrument. The mere transfer of possession together with intention of parties to make a mortgage is not effectual on the ground of the equitable doctrine of part performance

*This case was instituted before the amendment of Sec. 59 of the Transfer of Property Act by the amending Act of 1929

58 Cal 1235 P.C. **Relied upon.** *20 I.C. 28, 63 I.C. 400, 10 Patna 417* and *1932 All 259* **Distinguished.**

Messrs. C.F. Ball of Agra and Moti Lal Malavyar—for the Appellant.

R.B. Mithan Lal Bhargava and Mr. Sri Lal Agarwal—for the Respondents.

Order.—The facts material to this second appeal are briefly as follows. Plaintiff sued to redeem a usufructuary mortgage alleging that the suit property had been mortgaged by his ancestors to the ancestors of defendants 1 and 2. The plaint sets out that the mortgage was executed in 1887 A.D. for Rs. 110. Defendants 3 to 5 were joined as being jointly interested with plaintiff in the right of redemption. Defendants 1 and 2 denied the existence of the mortgage and set up their own title.

The trial Court found in favour of the title of defendants 1 and 2 against the mortgage.

On appeal the Special Additional District Judge held that property originally belonged to plaintiff's ancestors and had been mortgaged to defendants 1 and 2's ancestors, but that there was no satisfactory evidence of either the terms or the date of the mortgage. He therefore confirmed the trial Court's decree.

In second appeal Mr. Ball for plaintiff argues that it is sufficient for plaintiff to prove that the relationship of mortgagee exists in order to get a decree and that it lies on the defendant to prove how much is due to him on the mortgage. In support of this contention he relies on the following rulings: *Ganeshi Lal* vs. *Basanti Lal and others*[1], *Rajpati Rai and others* vs. *Mst. Sukwaro Kuer and others*[2], *Kailash Rai* vs. *Mst. Jaga Kuer*[3], *Halka* vs. *Nannhon*[4]. The

(1) 20 I.C. 28 (2) 63 I.C. 400
(3) 10 Pat 417—1931 Pat 273. (4) 1932 All. 259.

theory behind these rulings is that a mortgage is a derogation from title, that the mortgagor can therefore sue on title, and leave it to the mortgagee to prove that the extent of the derogation, i.e. the amount due on the mortgage, is greater than admitted by plaintiff. At the same time a plea of adverse possession is barred by the doctrine of "once a mortgage always a mortgage".

R.S. Mithan Lal relies on Section 59 of the Transfer of Property Act which lays down that a mortgage for a sum exceeding Rs. 100 can only be effected by a registered instrument. As already stated the suit mortgage is alleged to be of the year 1887 A.D., i.e. after the Transfer of Property Act had come into force and for Rs. 110. How, asks R.S. Mithan Lal, can the relationship of mortgagor and mortgagee exist without proof that the only legal method of creating this relationship was adopted. Mr. Ball invokes the equitable doctrine of part performance and argues that transfer of possession together with the intention of parties to create a mortgage is as effectual as a registered instrument.

Until 1931 the argument might have prevailed. But in that year the contest between equity and statute law came before the Privy Council in *Ariff* vs. *Jadunath Majumdar*[1]. In the course of their judgment their Lordships remark. "Whether an English equitable doctrine should in any case, be applied so as to modify the effect of an Indian statute may well be doubted, but that an English equitable doctrine, affecting the provisions of an English statute relating to the right to sue upon a contract should be applied, by analogy, to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible". It is true that that case was concerned

(1) 58 Cal. 1235=1931 P. C. 79.

with a lease and not with a mortgage, but the words quoted obviously apply equally to a mortgage.

Looking to this authority it is clearly impossible to hold that the relationship of mortgagor and mortgagee ever existed between the parties and that is fatal to appellants case, since regarding the suit as one for possession it is obviously time barred as defendants or their predecessors *in* title have admittedly been in possession since 1887.

Of the cases relied on by Mr. Ball it may be observed that in *Ganeshi Lal* vs *Basanti Lal and others* the mortgage was executed before the Transfer of Property Act came into force and that in *Kailash Rai* vs. *Mst. Jaga Kuer* and *Rajpati Rai and others* vs. *Mst. Sukwaro Kuer and others* the sum secured was less than Rs. 100. In *Halka* vs. *Nannhon* the point now taken by R. S. Mithan Lal was apparently not argued but the Court observes that the defendants had not alleged adverse possession as proprietors. It is arguable that as long as the party in possession supposes though wrongly, that he is a mortgagee, his possession can not become adverse. But here the defendant 1 and 2 in addition to denying the mortgage state (vide written statement, para 9) "The defendants as owners have been in possession of the property of their share". This is a clear assertion that their possession was adverse to plaintiffs.

Mr. Ball argues that it is un-fair that a mortgagor should be penalized because the mortgagee neglects to register the instrument. When however a mortgage is with possession it seems to me equally the duty of the mortgagor to see that the instrument is valid and I believe it would be found that failure to register is usually due to the unwillingness of the mortgagor to pay the fees.

The appeal fails and is dismissed with costs in favour of respondents 2 and 3.

Appeal dismissed.

BEFORE MR. D. R. NORMAN, I.C.S.

Mahant Hari Das .... Plaintiff—Appellant.

Versus.

Municipal Committee, Ajmer .... Defendant—Respondent.

Second Appeal No. 31 of 1934, decided on July 9, 1934, against the decree, dated April 9, 1934, passed by the Special Additional District Judge in Appeal No. 194 of 1934.

Ajmer Municipal Regulation—S. 194 (1), 198, 200 and 225—Civil court has no jurisdiction to question the notice under section 200.

The appellant applied to the Municipality under section 194 (1) for permission to re construct. Without waiting for permission he reconstructed. Subsequently, within the one month required by section 198, the Municipality refused permission and served a notice, under section 200, on the appellant to demolish the construction. The appellant filed the suit for an injunction on the Municipality not to demolish the construction.

Held, Section 225 of the Ajmer Municipal Regulation bars the jurisdiction of the civil court to grant the relief of injunction.

Ajmer Municipal Regulation—S. 198 (Explanation)—scope.

Municipality can refuse permission where there is a dispute about title. The party asking permission must, if permission is refused on the ground of want of title, go to the civil court for a declaration of title. Until the civil court has found in favour of the party, the refusal of the Municipality is final.

Civil Procedure Code—S. 100—A finding of fact—Title.

Title, unless it depends upon the construction of a single document, is a question of fact which cannot ordinarily be gone into in Second Appeal.

Civil Procedure Code--Order 13 Rule 3,—Rejection of document not produced from proper custody

It is not a valid ground for rejecting a document, that it was not produced from proper custody.

Evidence Act—S. 110—Burden of proof.

"Possession' in S. 110 means "possession for reasonable period" and what is reasonable period will depend on the character of the property.

Dr. Narayan Prasad Asthana (of Allahabad) and *Mr Ghisu Lal*, for Appellant.

Mr. Chunni Lal Agarwal—for Respondent.

Order.—The facts material to this second appeal are as follows Appellant applied to the Municipality under Section 194 (1) of the Ajmer Municipal Regulation for permission to rebuild a chabutri and a khura. Without waiting for permission he commenced the work. Subsequently the Municipality refused permission and served a notice on the appellant under Section 200 to demolish the construction. The appellant there upon filed the suit out of which this appeal arises for an injunction on the Municipality not to demolish the construction, alleging that the notice under Section 200 was illegal. In their written statement the Municipality up-held the legality of their action, questioned the jurisdiction of the Court to try the suit, and further alleged that the chabutri and khura which the appellant had sought to rebuild were themselves a new construction and an encroachment on street-land.

The trial Court held that it had no jurisdiction in the matter, that the constructions were three to four years old and were not upon appellant's land. It therefore dismissed the suit. On appeal the Special Additional District Judge held that in as much as a question of the title to the land was in issue the civil Court had jurisdiction, but that the chabutri and the khura were recent and new constructions, and were not on appellant's land. He therefore dismissed the suit.

I take the question of the civil Court's jurisdiction first. It is now conceded that the Municipality did give notice of their refusal to allow reconstruction within the one month

required by Section 198 and therefore that the notice given under Section 200 was legal. Now Section 225 allows an appeal to the Commissioner against a notice under Section 200 and provides that such notice is not liable to be called in question otherwise than by such appeal. Clearly therefore in so far as the relief claimed by the appellant is an injunction on the Municipality the civil Court had no jurisdiction. It is argued that, as the refusal of the Municipality was not based on sanitary or such like considerations but on its assertion of title, the civil Court must have power to enquire into the legality of the refusal. In the first place the refusal was not on its face grounded on appellant's alleged want of title. No reasons are stated in it, and it was not till the written statement that appellant's title was questioned. Secondly, the explanation to Section 198 permits the Municipality to refuse permission when there is a dispute about title until such the party asking permission must, if permission is refused on the ground of want of title, go to the Civil Court for a declaration of title. But until the civil Court has found in favour of the party the refusal of the Municipality is legal. In so far therefore as the suit is for an injunction it does not lie.

But as the suit has been fought out in both Courts on the question of title I am asked, in order to save future litigation to treat it as if there had been a prayer in the plaint for a declaration. In as much as the Municipality by their written statement directly challenged the appellant's title and an issue was framed thereon and not objected to I think this request is reasonable and I acceed to it.

Now title, unless it depends upon rhe construction of a single document, is a question of fact which cannot ordinarily be gone into in second appeal. Mr. Asthana asks me to interfere on three grounds:

(1) that inadmissible evidence was admitted,

(2) that admissible evidence was rejected, and

(3) that the burden of proof was wrongly placed.

The inadmissible evidence is Ex. D. 17 a map prepared by one Mr. Henniman in 1910. The admission of this map was however not challenged when it was put in. It would, if certain circumstances were proved, be admissible under Section 32 of the Evidence Act. Appellant, having failed at the time of admission to put the other side to proof of the existence of these circumstances, must be taken to have admitted their existance. This ground therefore fails.

The documents said to have been wrongly excluded are: (1) the judgment in Criminal Case No 9. of 1921 in the Court of Honorary Magistrate, (2) a rent note. The first was rejected as not falling under Section 43 of the Evidence Act. It is argued that it is relevent under Section 13 as a transaction in which appellant's title was recognised. I have however read the judgment and it has not recognised appellant's title. The rent note was rejected because it was not produced from proper custody. This is not a valid ground for rejection. It is a rent note of appellant's property of the year 1920 and refers to a chabutri outside the gate way. It is however only one very small piece of evidence and I am not prepared on the strength of it alone to upset the concurrent findings of the fact of the Courts below.

Coming to the last point it is argued that, it having been found that the chabutri did exist at the time, permission to reconstruct was asked for, appellant's possession threw the burden of proving title on the other side. Section 110 of the Indian Evidence Act is invoked and *Krishna Aiyar vs. The Secretary of State for India in Council*[1] referred to. In that case however the possession of the plaintiff was for thirty years, and though this did not give him a title by adverse

(1) 33 Mad 173

possession, since the suit was against the Secretary of State it was held that it threw the burden on the Secretary of State to establish title and possession within 60 years. Now in the present case the trial Court held that the chabutri and khura had existed for about four years. As the judgment is dated 21st December 1931 and the suit was filed in November 1928 this means that they had existed for about a year before the suit. The finding of the lower appellate Court is that the chabutri and khura are recent and new constructions. In my view "possession" in Section 110 means possession for reasonable period, and what is a reasonable period will depend on the character of the property. It is not shown that the appellant made any particular use of the chabutri. Indeed he only seems to have possessed it in the sense that it adjoins a bagichi of which he was in possession. Looking to all the circumstances I do not think that possession for such short a time is sufficient to throw on the Municipality the burden of proving their own title. I therefore hold that the appellant has not proved his title to the land occupied by the chabutri and khura.

I confirm the decree of the lower appellate Court and dismiss this appeal with costs.

Appeal dismissed.

BEFORE MR. D. R. NORMAN,

Ram Kishen, died represented by his sons Mangi Lal and others .... Defendants—Appellants.

Versus.

Ram Chander .... Plaintiff—Respondent.

Second Appeal No. 18 of 1934, decided on July 10, 1934, against the decree, dated January 30, 1934, passed by Senior Sub-Judge, in Appeal No. 8 of 1932.

Evidence Act.—S. 116—Tenant estopped from denying his landlord's title even though possession prior to execution of rent note.

A tenant is estopped from denying his land-lord's title even though he had possession prior to the execution of the rent note. *36 I. C. 817, 50 I. C. 591, 51 B. 487, 1923 All. 53* **Foll.** *25 I. C. 615, 1921 Nag. 62* **dissented from**

Evidence Act,—S. 116—Tenant can allege fraud, misrepresentation or mistake of fact,

It is open to the tenant to allege fraud, misrepresentation or mistake of fact, which latter expression will include ignorance of his lessor's want of title

Mr. Moti Lal Malayvar.—for Appellant.

Mr. Ghisu Lal.—for Respondent.

Order.—This second appeal arises out of a suit for ejectment and rent on the basis of a rent note. The defendant pleaded that he was in possession when he executed the note, that plaintiff had no title and had obtained the note by fraud. The trial Court held that fraud was proved and dismissed the suit.

In appeal the Senior Sub-Judge framed one issue only, namely, "Was the finding of the lower Court that the rent-note sued upon was procured by fraud and misrepresentation, wrong?" and decided it in the affirmative. He held that the defendant was in possession when he executed, the rent-note, that it was open to him to plead that he had executed it in ignorance of a defect in the plaintiff's title or owing to fraud, that the plaintiff had such an interest in the property as entitled him to let it, and that fraud was not proved. He therefore allowed the appeal and decreed the suit. On the point of title he allowed plaintiff to put in certain documents not produced before the trial Court.

The main ground of appeal is that the Senior Sub-Judge should not have allowed the production of these documents and that some of them are otherwise inadmissible in evidence. But in the view I take this question does not arise.

It is now settled law that a tenant is estopped from denying his land-lord's title even though he had possession prior to the execution of the lease or rent note. *Adatrao Gavayayyamma vs. Dandi Seetharamaswami and others*[1] a decision to the contrary was over ruled by the full bench decision in *Venkata Chetty vs. Aiyanna Gounden*[2]. *Mt. Laxmibai vs. Devi and another*[3] relied on by appellant merely follows *Adatrao Gavayayyamma* vs. *Dandi Seetharamaswami and others*[1] in ignorance that it had been overruled. The view taken in *Venkata Chetty* vs. *Aiyanna Gounden*[2] is also taken by other High Courts, c, f, *Makhan Singh* vs. *Baisakhi Ram Shah*,[4] *Nagindas* vs. *Purshottam*[5] and *Babu Sital Prasad* vs. *Badri Prasad*[6]. It is however open to the tenant to allege fraud, misrepresentation or mistake of fact, which latter expression will include ignorance of his lessor's want of title. This however is not to say that the lessor must prove his title: it is for the tenant to prove, not merely that the lessor had no title, but that he himself was ignorant of this fact.

Now in the present case what is alleged is not mistake, but the fraudulant misrepresentation of the plaintiff The Senior Sub-Judge has held that the misrepresentation alleged is not proved and this is a finding of fact by which I am bound. Further there can be no mistake when the party alleging it had opportunity of ascertaining the truth Here defendant is the brother of plaintiff and the property is ancestral. The defendant therefore had every opportunity of

1. 25 I C. 615=1919 Mad, 420.
2. 36 I C 817=1917 Mad 78?
3. 1924 Nag 62.
4. 50 I. C 591=1919 Lah. 334.
5. 54 Bom 487=1930 Bom 395.
6. 1923 All 53

knowing to whom the property had descended and so whether the plaintiff's title deeds gave him a good title.

The appeal thus fails and is dismissed with costs.

Appeal dismissed.

BEFORE MR. D. R. NORMAN, I. C. S.

Chandan Mal .... Plaintiff-applicant.

Versus.

Jetha .... Defendant-Opposite party.

Small Causes Court Revision No. 48 of 1934, decided on July 12, 1934, against the order passed by the Court of Small Causes, Ajmer, in suit No. 4207 on September 18, 1933.

Hindu Law —Guardian—Minor only bound when Contract to his benefit.

To make a minor liable on a bond executed by his guardian, it must be shown that the bond was for his benefit.

Evidence Act – S. 114—Presumption against executant where consideration for a bond is past debt.

Where the consideration for the bond is past debt it is a proper presumption against the executant that the debt for which the bond was taken was not time barred.

Evidence Act – S. 100—Burden of proof when bond executed by guardian of a minor and the consideration for it is past debt of the minor's father.

When a bond is executed by the natural guardian of a minor and the consideration for it is past debts due by the minors' father the creditor must prove affirmatively that the consideration for the bond was good, that is to say, that the debts in lieu of which it was executed were not time barred.

Mr. Jasoda Nandan Bhargava.—for Applicant.
Mr. Daya Shanker Bhargava.—for Opposite party.

Order.—The applicant filed a suit against the opponent on a bond executed by the opponent's mother, Anchi, during the minority of the opponent. The consideration for the bond was past debts due by opponent's father, Surta. The trial Judge held that it was not proved that on the day on which the bond was executed a suit for the previous debts would be in time and that the bond was therefore not for the benefit of the opponent. He passed a decree against the opponent as legal representative of his mother, Anchi.

In revision it is contended that a decree should be passed against opponent as legal representative of his father, Surta. It is argued that in holding that the debts had become time barred the trial Court neglected an acknowledgment signed by Anchi on the credit side of Ex. P/3. But in point of fact this acknowledgment was not relied on in the trial Court and no attempt was made to prove Anchi's signature. Mr. Jasoda Nandan then argues that as no written statement was filed it ought to have been presumed that the debt for which the bond was taken was not time barred. As against the executant I agree that this would be a proper presumption, but to make a lminor liable on a bond executed by his guardian it must be shown that the bond was for his benefit. It was therefore for the applicant to prove affirmatively that the consideration for the bond was good, that is to say that the debts in lieu of which it was executed were not time barred.

The application is dismissed with costs.

Application dismissed.

BEFORE MR. D. R. NORMAN, I. C. S.

Ram Chandra .... Defendant-Appellant.

Versus.

Radha Kishan .... Plaintiff-Respondent.

Second appeal No. 27 of 1934, decided on July 17, 1934, against the decree dated February 1, 1934, passed in Civil appeal No. 80 of 1929.

Ajmer Regulation III of 1877 – Sec: 33—Rule of Damdupat.

Interest decreed by a Civil Court may not exceed the amount of the principal sum of money received by the defendant.

Pleadings—Points not pleaded but in Issues.

When points are put in issues which do not appear in the pleadings, it is a sound rule to follow the issues, *16 Bombay 515* **Foll:**

Succession Act—SS. 381 & 387—Debtor cannot question a succession certificate

A debtor to the estate of the deceased can not get a certificate set aside by a declaratory suit or question the certificate as a defendant *1925 All. 66 and 1931 Lah 79 (1)* **approved.**

Succession Act—S. 387—debtor is not a proper party—Parties—meaning of:

Debtor is not a proper party to succession certificate proceedings. The word 'parties' in S 387 means proper parties, i.e rival claimants to a certificate and not debtors of the deceased's estate. *4 All 335* and *36 All 423* Foll.

Messrs. Raghu Nath and *Sri Lal Agarwal*—for Appellant.

Messrs. Ghisu Lal and *Jasoda Nandan Bhargava*—for Respondent.

Order—The plaintiff-respondent filed a suit against defendant-appellant to recover Rs. 300 with interest alleging that he had deposited it with defendant in the name of one Mst. Farmi. The trial Court held that the money belonged to Farmi and dismissed the suit. In first appeal plaintiff

claimed as the heir of Parmi and the Court after allowing him time to obtain a succession certificate decreed his claim.

In second appeal three points are taken

(1) Plaintiff should not have been allowed to succeed on a cause of action not pleaded.

(2) The Additional District Judge was wrong in relying on the succession certificate alone and excluding other evidence.

(3) The amount decreed is in excess of the law of damdupat.

I find for respondent on points (1) and (2) and for appellant on point (3).

In the plaint plaintiff claimed on his own title and his statement in paragraph 6 that Parmi was a relation was only incidental to that claim. But in his written statement defendant stated quite unnecessarily: 'plaintiff is not the heir of Mst. Parmi", and further alleged that a succession certificate was required. As a result the following issues were framed.

(1) Did the money credited belong to the plaintiff or Mst. Parmi ?

(2) Is the plaintiff a relation of Mst. Parmi ?

* * * * *

(5) Is the suit not maintainable without obtaining the succession certificate ?

It is argued that these issues did not put in issue the question whether plaintiff was the legal representative of Parmi. For the word in issue (2) is 'relation' legal representative and the issue was framed beca ding that plaintiff was a relation of Parmi m ory of a deposit in Parmi's name more ; her

side it is argued that on this theory the words 'or Mst. Parmi' in issue No. (1) would be otiose and that evidence was led not merely to show that plaintiff was Parmi's relation but that he was Parmi's nearest relation. If issues (1) and (2) stood alone I should consider their interpretation doubtful. But the 5th issue can only be explained on the hypothesis that there was before the Court an alternative claim to succeed as heir to Parmi.

When points are put in issue which do not appear in the pleading I think it is a sound rule to follow the issues. Authority for this view may be found in *Ramkorgopalji* vs. *Gangaram*[1]. Moreover, as O. 14, R. 3 shows, issues may be framed not only on the pleadings but on allegations made by the pleaders of parties, and if some thing appears in the issues which is not in the pleadings it is a reasonable presumption it was put forward by counsel at the time of framing the issues. Of course if counsel wishes to introduce new matter into the suit then, it is open to the other side to object and the Court must hear the objection. But if the other side does not object then it can not be permitted to make it a ground of appeal that the issues are not in accordance with the pleadings. I would add that in Ajmer-Merwara far too little attention is paid by both counsel and Judges to the issues with the result that a frequent ground taken in 2nd appeal is that the issues were not properly framed.

I hold that plaintiff's claim to succeed as the legal representative of Parmi was in issue between the parties.

In accordance with the directions of the Additional District Judge plaintiff applied for a succession certificate. Defendant opposed the application but was not permitted to oppose on the ground that he had no locus standi, being a mere debtor, and the certificate was given ex parte. The Additional District Judge then held that the certificate was

(1) 16 Bom. 515.

conclusive and refused to consider oral evidence. It is now urged that the certificate was not conclusive.

The relevant Sections of the Succession Act are Section 381 and Section 387 which run as follows

Section 381. "Subject to the provisions of this part, the certificate of the District Judge shall, with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwithstanding any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted".

Section 387. "No decision under this part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto".

Mr. Raghunath for defendant argues that the words in Section 381 "Subject to the provisions of this Part" have direct reference to Section 387 and that as a party to the certificate proceedings he can re-agitate the question in a civil suit. Mr. Ghisulal for plaintiff replies that the word 'parties' in Section 387 means proper parties, i. e. rival claimants to a certificate, and not to debtors of the deceased's estate.

I have no doubt that the latter view is correct. On Mr. Raghunath's view the first part of Section 381 becomes useless because it is over-ruled by Section 387. The object of this Part of the Act is to determine some one to whom a debtor to the deceased's estate may safely pay the debt, the debtor has no interest in such determination and is therefore not a prop

party to succession certificate proceedings. Such authority, as there is, supports this view. In *Gaura* vs. *Gayadin*[2] and *Rupan Bibi v Bhagelu Lal*[3] it was held that a debtor to the estate could not get a certificate set aside by a declaratory suit, from which it is a natural inference that he can not as defendant question a certificate. In *Peare Lal* vs. *Jhabba Lal*[4] and *Charan Das* vs. *Nathu Mal*[5] the view put forward by Mr. Ghisulal was adopted. It is true that in neither of these cases was any argument founded on Section 387, but that in itself is some evidence that such argument is fallacious

I find that the Additional District Judge was right in refusing to allow defendant to question the certificate.

The last point goes in favour of defendant. Section 33 of Regulation III of 1877 provides that interest decreed by a civil Court may not exceed the amount of the principal sum of money received by the defendants. Mr Ghisulal argues that when an account is balanced by adding interest to the principal the total sum arrived at becomes the principal. I do not agree. Mere accounting can not turn interest into principal, nor can interest added to principal in an account be said to be "received by the defendant". The decretal amount must thus be reduced to Rs. 600. But as defendant did not raise the point, in which he has succeeded, in the Courts below or in his memorandum of second appeal I allow him no costs.

I set aside the decree of the lower appellate Court and award plaintiff a decree for Rs. 600 with costs on that amount in all three Courts. Future interest is not awarded because it is not claimed in the plaint and the lower appellate Court's decree states that "plaintiff's suit is decreed with costs". I would observe however that this is a slovenly and objectionable way of drawing up a decree. A decree should always state the exact relief awarded.

Decree modified.

2. 4 All 355
3 36 All 423=1914 All 420
4. 1925 All 66
5. 1934 Lah. 79 (1)

BEFORE MR. D. R. NORMAN, I. C. S.

Firm Champa Lal Ghisu Lal .... Plaintiff-Appellant.

Versus.

Firm Ajey Raj Sheodan Singh... Defendant-Respondent.

Second Appeal No. 36 of 1934 decided on July 17, 1934, against the decree, dated March 19, 1934, passed by the Special Additional District Judge, in appeal No 83 of 1933,

Tort—Conversion—Measure of damages is value of goods on date of conversion.

The measure of damages for a wrongful sale is ordinarily the value of the goods on the date of sale, *1927 Lah. 408* **foll.** *20 B. 633* **referred.**

Principal and Agent—Agent's authority to sell.

In the absence of instructions from his principal, an agent has no right to sell.

Mr. Brahma Datta Bhargava—for Appellant.

Mr. Moti Prasad Mehra—for Respondent.

Order.—This appeal arises out of a suit for accounts. Plaintiff-appellant is the principal and defendant-respondent is the agent. The portion of the account in dispute in this appeal relates to 19 (nineteen) bales of cotton, which were sent to respondent for pressing, ginning and sale. In May 1926 respondent sold these bales at Rs. 19 per *maund*. In August 1926 appellant wrote to respondent directing him to send the bales to one Ridh Karan. The letter added that in default he would be liable to damages at Rs. 35 per maund. This letter was returned marked 'refused'.

The question is at what rate should the price of the bales be credited in the accounts.

Unfortunately as counsel on both sides now agree, both the Courts below missed the real point and devoted most of

their judgments to considering whether defendant was fixed with notice of the contents of the August letter. Obviously this is entirely irrelevant since at that date the bales were already sold.

The real points which arise are

(1) Was respondent justified in selling the bales.

(2) If not should the measure of damage be

(a) the market rate at a subsequent date arbitrarily selected by appellant or,

(b) the market rate on the date at which the bales were actually sold, or

(c) any other standard?

Point (1) was not considered at all by the trial Court. The Special Additional District Judge held that appellant's consent to the sale was implied but this finding was based on certain letters which, Mr. Moti Prasad for respondent now concedes, had not been put in evidence in the trial Court.

In the absence of instructions from his principal an agent has no right to sell. Mr. Moti Prasad argues that respondent had general instructions to sell according to his judgment. There is however no evidence of this, it is not specifically pleaded and is contrary to the case put forward by respondent in first appeal. The finding on the first point must therefore be that respondent was not justified in selling the bales.

The second point is more difficult. For the proposition that the measure of loss will be price at some future date to be selected by the principal no authority had been quoted. In *Manchubhai* vs. *Tod*[1] a case of wrongful sale by an agent it is said "In the case of articles of common merchandise,

(1) 20 Bom 633

the state of the market subsequent to the sale would afford the criterion by which to fix the loss." But the remark was obiter and the exact meaning of the word "subsequent', is not obvious. In *Alliance Bank of Simla Ltd.* vs. *Ghmandilal*[1] it was held that the measure of damages for a wrongful sale is ordinarily the value of goods on the date of the sale. No third measure of damages has been suggested. In my view the first measure of damages is unduly favourable to a principal since it enables him to select an arbitrary date. In this case that appellant knew that the bales were already sold is not definitely proved, but looking to the terms of his letter I think it highly probable. I therefore propose to adopt the measure of damages set out in *Alliance Bank of Simla Ltd.* vs. *Ghamandilal*[1]. As the Courts below have found that Rs. 19 per maund was the market rate on the day of sale it follows that appellant can get no damages beyond those allowed. I would add however that the sale being wrongful, respondent is not entitled to any commission fee in respect of it.

Subject to above remark the decree of the lower appellate Court is confirmed. As however it has been confirmed on other different grounds I make no order for costs in this appeal.

(1) 1927 Lah 408.

Decree confirmed.

BEFORE MR. D. R. NORMAN, I. C. S.

Surya Nand, Baba .... Plaintiff-Appellant.

Versus.

Santok Chand and others .... Defendants-Respondents.

Second appeal No. 16 of 1934, decided on July 24, 1934, against the decree passed by Additional District Judge in appeal No. 91 of 1932, on December 18, 1933.

Ajmer Regulations—H, to L—Manager can remit Hasil beyond his life time for justification.

The Manager can grant partial remission of Hasil beyond his life time for a good consideration, *1922 P. C, 123* **not applicable.**

R. B. Mithan Lal Bhargava.—for Appellant.

Mr. Raghu Nath Agarwal.—for Respondant.

Order.—In 1916 one Amra Nand, the then manager of the jagir of Chatri Surji Rao, granted a partial remission of hasil for 50 years to the occupants of land styled Bala Sundka in consideration of their digging a well The remission was on a sliding scale; in the first year a 50th of the hasil was to be paid, in the second a 49th and so on. The suit out of which this second appeal arises was filed by Amra Nand's successor under the guardianship of the Court of Wards for a declaration

(1) that the remission was invalid

(a) because the well was not dug,

(b) because Amra Nand could not give a remission beyond his life time, and

(2) that the remission related to No. 873 only.

2. Both the Courts below dismissed the suit. I will take the second declaration first. What land is comprised in the Bala Sundka land is a question of fact which can not be challenged in second appeal. R. B. Mithan Lal argues that oral evidence was not admissible on this point. I do not agree; oral evidence is clearly admissible under proviso 6 of Section 92 of the Indian Evidence Act. This finding also concludes my finding on the first part of the first prayer, since admittedly a well was dug in the land which the Courts below have found to be included in the Bala Sundka land.

The sanad under which the Chatri Surji Rao Jagir is held is printed at page 604 of the Ajmer Regulations, H. to L. The sanad states that the Manager has no power to alienate

the revenue-paying land of the Estate on revenue-free tenure. In the present case, however, the alienation is not permanent nor is the revenue entirely remitted. R. B. Mithan Lal then argues that under Hindu Law the Manager of a temple can not alienate beyond his life time and refers to *Varuthi Thirtha Swamigal V. Baluswami Ayyar and others*[1]. In that case it was held that a lease without justification granted by the head of the *mutt* was valid for his life only. That decision has no application here since it can not be held that the remission was without justification. It was for good consideration, namely the construction of a well which would when constructed greatly benefit the jagirdar, since the hasil is not payable in cash but consists of a share in the produce which would be increased by the well.

Grounds 8 to 10 of the memorandum of appeal go outside the pleadings in the case and I have therefore not allowed them to be argued. I confirm the decree of the Courts below and dismiss this appeal with costs.

Appeal Dismissed.

(1) 1922 P C 123.

BEFORE MR. D. R NORMAN, I. C. S.

Firm Chandan Mal Mohan Lal .... Plaintiff-Applicant.

Versus.

(1) *Firm Bhola Ram Phool Chand*, and

(2) *Ram Bux* .... Defendants-opposite party.

Small Cause Court Revision No. 50 of 1934, decided on July 31, 1934, against the order of the Small Cause Court, Nasirabad, passed on March 27, 1934 in suit No. 282 of 1932.

Limitation Act.—S. 18—Scope of:

"Fraud" under S. 18 of Limitation Act cannot have a different meaning from fraud in S. 415 of Indian Penal Code.

Small Cause Courts Act (Provincial)—Art 35 (ii)—Scope of:

An action under S 235 of the Contract Act is an action in tort.

Mr. Ram Chandra Airan.—for Applicant.

Mr. Daya Shanker Bhargava.—for Opposite-party.

Order.—The plaintiff firm filed a suit in the Court of Small Causes against the firm of Bholaram Phulchand alleging that it had through its agent Ram Bux executed a khata for consideration in plaintiff's favour. The defendant firm denied that Ram Bux was its agent. The plaintiff's thereupon asked for leave to amend the plaint and join Ram Bux as defendant alleging in the alternative that Ram Bux was liable for damages for falsely holding himself out to be the agent of the defendant firm.

2. The Court held that the amended plaint amounted to an allegation of an offence punishable under Chapter XVII of the I. P. C. on the part of Ram Bux and therefore that the suit was excluded from the cognizance of the Small Cause Court by Article 35 (ii) of the Small Cause Courts Act. Against this order plaintiffs have come in revision.

3. As against Ram Bux the plaintiff's suit falls under Section 235 of the Contract Act. An action under that Section is really an action in tort. Mr. Ramchandra for plaintiffs argues that a tort is not necessarily a crime and that Ram Bux may have been guilty merely of a bona-fide mistake. But in order to bring the suit within time plaintiffs have alleged that Ram Bux committed a fraud on the plaintiffs in inducing them to believe that he had authority. Now fraud under Section 18 of the Limitation Act can not have a different meaning from fraud in Section 415 I. P. C. It follows that the trial Judge's order was correct.

4. The application is dismissed with costs in favour of Ram Bux.

Revision Dismissed.

BEFORE MR. D. R. NORMAN, I. C. S.

Amba Lal, Mr. .... Plaintiff-Appellant.

Versus.

1. Hari Shanker. 2. Sham Lal.
3. Ram Jas .... Defendants-Respondants.

Civil first appeal No. 9 of 1934, decided on July 31, 1934, against the decree passed by the Additional District Judge, in Suit No. 6 of 1931, on October 9, 1933.

Arbitration—Award bars suit.

Award is a bar to a suit on any matter dealt with by the award; this doctrine is not statutory but is common law doctrine, *11 Cal. 386 and 18 Cal. 414* **foll:**

Arbitration—Award—Partly bad partly good—Terms separable—Good terms a bar to suit.

An award though partly unenforceable, may as regards other terms which are separable, operate as a bar, *1921 Cal. 253, 18 Cal. 414, 36 All. 336, 1923 Patna 470* **not foll.**

Arbitration—Reference—Pendency of suit which is withdrawn no bar to:

The pendency of a suit which is withdrawn does not make a reference illegal in consequence, *49 Cal. 608,* **referred:**

Civil Procedure Code—S. 89—Does not alter old law.

S. 89 of the Civil Procedure Code (1908) does not alter the old law at all, the words "any other law for the time being in force" do not refer to statute law alone, 43 All. 108, 51 Bom. 908, 51 Mad. 800 **foll,** 49 Cal. 608 and 1933 Lah. 146 held **not applicable** (as they applied to award made without intervention of the Court during pendency of the suit).

Civil Procedure Code (1908)—Schedule II, Para 22—Bar to a suit.

Schedule II, Para 22 was not intended to set aside the law under which an award is a bar to a suit.

Contract Act—S 78—Failure to pay price.

Once plaintiff refuses to receive the money unconditionally, the defendants are not bound to tender it and such failure on their part does not amount to forfeiture of their title to the property.

Dr. Kailash Nath Katju (of Allahabad), Mr. Shiv Narain (of Delhi) and Mr. Mohan Lal Capoor.—for Appellant.

Messrs Peyare Lal Banerjee (of Allahabad), Ghisu Lal and Sri Krishan Agarwal—for Respondents.

Order.—1. The facts material to this appeal are as follows. In 1929 the District Local Board wished to sell a building with land attached known as the Dak Bungalow and called for tenders. On 9th October, the date fixed for tenders, the undermentioned five persons signed an agreement that if the tender of any one of them was accepted each should have the share shown against his name.

Ambalal	3⅓	Annas.
Harishanker	3⅓	,,
Ramjas	2	,,
Khandwala	3⅓	,,
Asaram	4	,,

Ambalal's tender was accepted.

2. It appears that the above persons, other than Ramjas, subsequently came to a new arrangement, for in January 1930 Harishanker, Khandwala, Asaram and another person, Shyam Lal, each paid to Ambalal a share of the deposit money, Rs. 10,000, proportionate to the following shares:—

Harishanker	2	Annas.
Khandwala	2½	,,
Asaram	2	,,
Shyamlal	2	,,

Thereafter disputes arose and on 7th April 1930 Ambalal sent notices to the above mentioned persons terminating the agreement. On the same day Khandwala, Asaram, Shyamlal, Ramjas and Raghunath, to whom Khandwala had transferred his share, applied to the Local Board that the sale deed should be issued in the names of all the sharers. Ambalal was called but as he would neither admit or deny the agreement the Local Board decided that this was a matter for the parties to settle among themselves and rejected the application. Thereafter on 18th April the parties came together and a document Ex. *D/4/6, referring their disputes to the arbitration of the* Railway Magistrate, Mr. Madan Gopal, was executed. To this document Hari Shanker was also a signatory but not Ramjas. The document set out the shares of the parties and asked Mr. Madan Gopal to divide the property by metes and bounds. On the same day a second document (Ex. D/4/7) to which Ramjas was a party was executed empowering Mr. Madan Gopal to decide whether Ramjas had a share and, if so, to award it to him.

3. The award, Ex. D. 4/17, was made on the 9th August. The Arbitrator gave Ramjas a one anna share reducing Ambalal's share *Pro tanto*. By this time Ambalal had paid the full amount to the Local Board, but of this a sum of Rs. 4800 was paid conditionally on the Local Board executing certain work. The Arbitrator directed that the parties should pay their shares of this Rs 4800 to him and their shares of the balance to Ambalal. Payment was to be made by 11th August.

4. The suit out of which this appeal arises was instituted by Ambalal on 7th May 1931 for a declaration of his sole title to the Dak Bungalow property. All the persons who had signed the reference to arbitration were made defendants. The gist of the amended plaint is that plaintiff had bought the Dak Bungalow from the Local Board, that in January 1930;

Harishanker (defendant 1), Shamlal (defendant 3), Khandwala (defendant 5) and Asaram (defendant 6) had become his sub-partners, that he had terminated the contract on 7th April because these defendants failed to pay their shares, that subsequently Ramjas (defendant 2) and Raghunath (defendant 4) asked for a share, but failed to perform their part, that certain subsequent arrangements fell through, that the property was under attachment under Section 145 Cr. P.C. and that the defendants were jointly and severally denying his title.

5. In answer to the Court's request for further particulars the plaintiff stated that a new arrangement was made on 18th April 1930 which was conditional on the defendants paying their shares of the purchase money by 30th April, that they failed to do so and that the breach consisted in their failure to do so.

6. The defendants filed a joint wirtten statement setting out the facts which I have stated and adding that the new agreement of January 1930 was made because the written agreement of 9th October 1929 had been mislayed, that Raghunath was the assignee of Khandwala's share, that plaintiff had refused to accept payment himself or allow it to be made direct to the Local Board, that on the award being made the defendants all paid their shares on or before 11th August 1930, that the award was a bar to the suit, that the property had been divided and the parties had taken possession of their shares, that plaintiff endeavoured to dispossess them and hence proceedings under Section 145 had to be taken, that the attachment was withdrawn on plaintiff's agreeing not to interfere with defendants' possession, that the suit was not maintainable under Section 42 of the Specfic Relief Act and that a Court fee stamp of Rs. 10 was insufficient.

7. Issues were framed and the trial Court found as follows:—

(1) Plaintiff purchased the property for himself and on behalf of Harishanker, Shamlal, Khandwala and Asaram subject to payment by them of their shares of the purchase money.

(2) There was no default in the payment of the purchase money.

(3) There was no contract on 18th April 1930, except the contract to refer to arbitration.

(4) The award was valid and was a bar to the suit.

(5) The suit was not maintainable under Section 42 of the Specific Relief Act.

(6) That the Court fee paid was sufficient.

On these findings he dismissed the suit.

8 The plaintiff has appealed joining Harishanker, Shamlal and the legal representative of Ramjas, who died pendente lite, as respondents. The reason for the omission of the other defendants is to be found in paragraph 8 of the trial Judge's judgment, in which he remarks that Raghunath and Asaram had come to a settlement with plaintiff and had withdrawn from the suit and that Khandwala having assigned his rights to Raghunath also went out. As regards Raghunath it appears from the proceedings for 4th March 1932 that plaintiff withdrew the case against him. His name however was not formally struck out of the plaint and appears at the head of the decree. I can trace nothing on the record to show that the suit was withdrawn against Khandwala and Asaram. Such neglect of proper procedure is much to be regretted, but does not affect the present appeal.

9. The points taken in argument before me are

(1) The sale by the Local Board is to plaintiff alone: defendants are at best only holders of a contract of sale which does not confer any title.

(2) Whatever rights defendants had, they lost them by failure to pay the full amount of their shares.

(3) The award is invalid and so not a bar.

10. It will be observed that until the reference the agreements between plaintiff and the respondents were separate. Ramjas's right existed under the agreement of October 1929, Shamlal's under the agreement of January 1930 while Harishanker's right arose under the October agreement and was modified under the January agreement. But as I shall show later the question before me is not what rights the respondent originally acquired but whether they forfeited them, and so it is not necessary to treat the case of each respondent separately.

11. In my judgment the first point is not now open to the plaintiff. The plaint together with the further particulars leave no doubt that his cause of action was not merely his title derived from the Local Board coupled with the defendants' obstruction, but included the alleged failure of the defendants to pay their shares of the price. That is to say the pleadings recognise that the purchase of the bungalow was made by plaintiff not for himself alone but for himself and on behalf of others. Further had the point been taken that the respondents were merely holders of a contract to convey, they could have set up the doctrine of part performance as enacted in Section 53 A of the Transfer of Property Act. There is nothing in the judgment of the trial Court to suggest that the present point was ever argued by plaintiff, nor is there any issue framed on which it could have been urged.

It is not set out in the memorandum of appeal and it has obviously originated in the brain of plaintiff's counsel Dr. Katju who was engaged after the appeal had been filed. Whether plaintiff is a benamidar to the extent of shares of the respondents is a question of fact and whether the respondents obtained a title under Section 53 A of the Transfer of Property Act is also a question of fact. To allow questions of fact which were never before the trial Court to be raised for the first time in appeal would obviously be wrong.

12. Coming to the question of payment it is argued on behalf of respondents that as they admittedly had a title, that title could not be forfeited by failure to pay their shares of the price, and that plaintiff's only remedy would be to sue for payment. I think there is a good deal in this argument. But it was not advanced in the written statement in the trial Court and I prefer to decide this appeal on the points taken in the pleadings of the parties.

13. The original agreement of October 1929 (Ex. D/4/1 did not specify any date of payment. The receipt given to Harishanker in January 1930 (Ex. P/21) stated that the balance is payable when Ambalal had to pay the District Local Board, while the receipt passed to Shamlal (Ex. P /20) says that it is payable on demand. These differences however are immaterial since the further particulars state that it was agreed on 18th April that the balances should be paid by 30th April and that the breach of the agreement consisted the respondents failure to do so.

14 Beyond plaintiff's word there is no evidence of any such agreement on April 18th, and it is quite clear that there could not have been such an agreement. For on April 18th the two references to arbitration (Ex. D. 4/6 and D. 4/7) were signed. In neither is it stated that the reference was contingent on payment being made. Moreover after 30th April proceedings before the Arbitrator still went on without any

protest being made by the plaintiff. It is quite clear therefore that the question of payment was put off until the Arbitrator had given his award.

15. The award was signed and pronounced on 9th August and beneath it there is an endorsement "This award is acceptable." signed by the three respondents and Mr. Mohan Lal Capoor who was plaintiff's counsel. The following payments to plaintiff were made then and there.

Harishanker	....	.... Rs. 9460 by cheque.
Shamlal	....	.... Rs. 9460 in cash.

These sums are the full amount due by Harishanker and Shamlal to plaintiff but do not include their share of the Rs 4800 which was payable to the Arbitrator. It appears from the evidence of the Arbitrator, D. W. 3 (para 9) that plaintiff left the cheque and cash in the Arbitrator's custody for the night. On the next day, as the Arbitrators proceedings (Ex. D. 4/19/B) show, Harishanker paid his share of the Rs. 4800 to the Arbitrator. Meanwhile plaintiff had decided that the award was not acceptable to him and passed a writing (Ex. D. 4/17/C) saying that he would only accept the sums already paid without prejudice to his contentions against the award. There is a note below by the Arbitrator that Rughnath and others were not willing to pay the amount on the conditions laid down by the plaintiff. The Arbitrator therefore sent the cheque and money received to the Bank.

16. D. W. 11, whose evidence I accept, states that he was sent by Shamlal to the Arbitrator on 11th August with Rs. 600) i.e. Shamlal's share of the Rs. 4800) but that the Arbitrator was away from Ajmer, and so he took it back. There is no further evidence of tender and the money was not paid into the Bank. The Bank books show that Ramji is paid Rs. 4000 on 11th August partly by cheque and partly by cash and Rs. 1331-7-3 by cash on 22nd August. This makes

up what was due from him except the amount due on account of his share in the Rs. 4800 which does not appear to have been paid.

17. Harishanker has clearly paid his share in time. The cheque was accepted by plaintiff and if he chose to leave it with the Arbitrator instead of taking it himself that was no fault of Harishanker's. Shamlal and Ramjas appear to be in default as regards their share of the Rs. 4800 and the question is whether that is such a default as deprives them of their title. In my judgment it is not. Once plaintiff had refused to receive the money unconditionally I do not think that respondents were bound to tender it That Shamlal had a share was never in dispute; it is set out in the conditions of the reference. By accepting Shamlal's money therefore plaintiff would not have admitted that the division into metes and bounds was a fair one. Ramjas's title was in dispute in the award. The nature of plaintiff's objections to the award are not set out but if he objected to the part which gave Ramjas a share he naturally could not expect payment from Ramjas. If his objection was only to the division by metes and bounds then, as in the case of Shamlal, it was not prejudiced by his accepting the money

18. My finding on the second point therefore is that the respondents have not forfeited their title to their shares in the Dak Bungalow by failure to pay to the plaintiff or to the Arbitrator their full shares of the consideration money.

19. As this finding concludes the appeal it is not necessary to decide the question whether the award was a bar to the suit But as the point was before the trial Court and a good deal of argument has been devoted to it in appeal I propose to deal with it briefly.

20. It is argued for plaintiff that since under Section 89 of the Civil Procedure Code all references to arbitration are

governed by the second schedule to the Code an award made out of Court has no legal effect unless and until it is filed in Court under paragraph 20 thereof. Now the doctrine that award is a bar to a suit on any matter dealt with by the award is not statutory but is a common law doctrine. In the head note to *Rani Bhagoti* vs. *Rani Chandan*[1] a Privy Council decision, the rule is stated as follows. "An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award." In *Muhammed Newaz Khan* vs. *Alam Khan*[2] also a Privy Council case an award was sought to be filed. The Court refused to file it because it thought that part of it dealt with matter which was not of civil jurisdiction. In a subsequent suit by a party to the award, Their Lordships held that as regards the portion which was not out of civil jurisdiction the award was a bar to the suit.

21. But it is argued that these decisions are rendered obsolete by Section 89 of the present Civil Procedure Code which was not contained in the Code of 1882. That Section runs as follows. "Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule". Now the construction of that section has undoubtedly given a great deal of trouble. In *Harakh Ram Jani* vs. *Lakshmi Ram Jani*[3] in which after the rejection of an application to file an award under paragraph, the disappointed party filed a regular suit for a declaration that the award was valid and binding, it was held that the suit lay and Section 89 had not altered the law. The construc-

(1) 11 Cal. 386 (2) 18 Cal. 414. (3) 43 All 103=1921 All 331.

tion of Section 89 was further fully considered in *Chanbasappa* vs. *Basalingayya*[1] and the same conclusion was reached, namely that it did not alter the law at all and was enacted merely because the provisions about arbitration were relegated to a Schedule and a section was needed to bring the Schedule into operation. I do not propose to set out at length the arguments used by the learned Judges: it is sufficient to refer to the one which impresses me most, namely, that the words "any other law for the time being in force" do not refer to statue law alone. A similar view was taken in *Subbaraju* vs *Venkatramaraju*[2]. Both these were full bench rulings. I should add that the question in both these cases was not whether an award made in the course of a suit without the intervention was a compromise under Or. 23 r. 3. It is thus the reasoning of the Judges rather than the actual decisions on which I rely.

22. In *Amar Chand Chamaria* vs. *Banwari Lall Rakshit*[3] an opposite view was taken about an award made out of Court during the pendency of a suit, but the *ratio decidendi* was that as the second Schedule provided a particular method for arbitration during the pendency of a suit, the Court could not recognize another method. This case is therefore not relevant to the present facts. Similarly it was held in *Abdul Rehman and others* vs *Mst. Ishar Kaul and others*[4] that an award made without the intervention of the Court during the pendency of a suit could not be filed under paragraph 20. This decision is equally irrelevant to the present case (?). I therefore hold that the enactment of Section 89 C.P.C. has not changed the law.

23. It is argued that since paragraph 22 of Schedule II repeals the proviso in Section 21 of the Specific Relief Act whereby an agreement to refer is a bar to a suit, it must be held that the law by which an award is a bar to a suit is

(1) 51 B 908=1927 Bom 183 (2) 51 Mad 809=1928 Mad 1025
(3) 49 Cal. 608=1922 Cal 404 (4) 1933 Lah 740.

also set aside. Paragraph 22 however was rendered necessary by paragraph 18 which provides a new remedy when an agreement to refer is pleaded in answer to a suit. There was nothing to correspond with paragraph 18 in the old Code, while paragraph 20 was a reproduction of Section 525. So in my judgment, paragraph 22 was not intended to set aside the law under which an award is a bar to a suit.

24. It is next contended that, as on the date of the reference, Ramjas had a suit pending against Ambalal, the reference was bad. The suit was withdrawn when the reference was made and I know of no authority for holding that the pendency of a suit, which is withdrawn in consequence makes a reference illegal. *Amar Chand Chamaria* vs. *Banwari Lall Rakshit*[1] certainly did not decide that.

25. It is then argued that the award is invalid because it exceeded the terms of reference in some respects, fell short of them in others and contravened them. The question however in the present suit is not whether the award is valid in all respects, but whether it is a bar to the suit. I have already quoted the authority of the Privy Council in *Muhammad Newaz Khan* vs. *Alam Khan*[2] for holding that an award though partly unenforceable, may as regards other terms which are separable operate as a bar. In *Hurmukhory Ram* vs. *The Japan Cotton Trading Co. Ltd.*[3] relied on by appellant, the bad parts of the award were not separable from the good. In *Jaldhari Rai* vs. *Muhammad Abdul Kabir*[4] it was held that an award which could not be filed because partly bad could not be set up as a defence as regards the part of it which was good. No reasons however are given for this part of the decision and it seems to be in conflict with the Privy Council ruling quoted. Indeed in *Amir Begam* vs. *Badr-ud-din Husain*[5] which was an application

(1) 49 Cal 603=1922 Cal. 401. (2) 18 C. 414.
(3) 1921 Cal. 253 (4) 1923 Pat 470.
(5) 36 All. 335=1914 P. C. 105.

to file an award under paragraph 20 Lord Parmoor remarked; "It is well recognized law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained.

26.' Now in the present case there is no difficulty in separating the parts of the award. Two main points were before the Arbitrator, the shares of the parties and the division by metes and bounds. The present suit is only concerned with the shares of parties. Now these were, except Ramjas', already fixed by the terms of reference. None the less since without the shares being fixed a division by metes and bounds was impossible, the fixing of shares, though not left to the Arbitrator's discretion becomes part and parcel of the award. As regards Ramjas' share it is argued that the Arbitrator contravened the terms of the reference by carving it out of plaintiff's share. The supplementary reference states that if for the purposes of awarding Ramjas a share, it is necessary to disturb the shares as settled in the main reference, the Arbitrator is at liberty to do so. I do not understand the use of the plural 'shares' to mean that the share allotted to Ramjas should be deducted proportionately from the shares as settled and I overrule this objection.

27. Lastly it is argued that respondents can not rely on the award because they have not performed their part of it. Now, in so far as the award provided, that respondents would forfeit their title if they did not pay all sums due by 11th August, the award was in excess of the reference, which is silent about payment. Further, as I have already held, the conduct of the plaintiff in repudiating the award released the respondents from any obligation to tender the amounts due from them. This objection thus fails.

28. Arguments have been addressed me to show that the division by metes and bounds is contrary to the provision

of the reference. This point was not put forward in the trial Court and does not arise out of the suit as framed. Probably the arguments were put forward in view of the trial Court's finding that the award was valid. This finding as I have already pointed out was not necessary for the determination of suit. The award even if not valid on all points may still be a bar to a suit.

29. It may be well to sum up my findings. They are as follows.

(1) The question whether the respondents ever acquired title was admitted in the pleadings and was not in issue in the suit.

(2) The question whether the respondents forfeited their title by failure to pay their shares of the purchase money is decided in the negative.

(3) I further find that whether or not the award is valid in all respects, it is a bar to the plaintiff's suit.

30. The appeal thus fails. I confirm the decree of the trial Court and dismiss the appeal with costs. I allow one set to Harishanker and Shamlal who were represented by same counsel and a second set to Ramjas. Pleaders' fee will be assessed on amount payable by each respondent for his share, including the amounts actually paid in January 1930.

Appeal dismissed.

BEFORE MR. D. R. NORMAN, I.C.S.

Sheo Narain .... Plaintiff-Appellant.

Versus.

Raja Ranchod Sen and others .... Defendants-Respondent.

Second Appeal No. 14 of 1934, decided on August 2, 1934, against the decree of Special Additional District Judge in Appeal No 37 of 1933, dated December 20, 1933.

Tort—Malicious Prosecution—What plaintiff should prove—Inference of want of reasonable and probable cause from falsity of complaint.

(i) Proof of plaintiff's innocence is not in all cases necessary for success in an action for malicious prosecution

(ii) The question whether the falsity or otherwise of the complaint is relevant will depend on the pleadings.

(iii) If it is proved that the complaint was not only false but false to the complainant's knowledge, then the court may infer want of reasonable and probable cause from these finding alone, *15 Lah.* 262 **followed.**

(iv) If the plaintiff fails to prove the falsity of the complaint, then there may be nothing from which court can infer want of reasonable and probable cause.

Messrs. Raghu Nath Agarwal and *Moti Lal Malavyar*—for Appellant.

R.B. Mithan Lal Bhargava—for Respondents.

Order.—This second appeal arises out of a suit for damages for malicious prosecution. The trial Court dismissed the suit holding that the plaintiff had failed to prove want of reasonable and probable cause On appeal the Special Additional District Judge remarked that want of reasonable and probable cause had never been pleaded, and that the suit was based on the falseness of the complaint.

The Special Additional District Judge then proceeded to consider whether plaintiff had proved this, and finding that he had not, dismissed the appeal. Here the Special Additional District Judge was in error. The plaint begins: "On 16th July 1927 defendant No. 1 made a false and groundless charge of theft against the plaintiff". Unfortunately the words "and groundless" were omitted in the translation in the Paper Book which probably mis-led the Judge. It is argued that the case should be remanded to the Special Additional District Judge for a finding on the question of reasonable and probable cause.

2. In my judgment a remand is not necessary, because, the Special Additional District Judge's finding that the complaint is not proved to be false, does in the present case involve a finding that plaintiff has not proved want of reasonable and probable cause.

3. The finding being one of fact would ordinarily be binding upon me. Mr. Raghunath attacks it on the ground of mis-direction contained in the following words:—"Moreover in Istimrari areas the Istimrardar is presumed to be the owner of all lands and properties until the contrary is proved". This remark is however fully warranted by Section 21 of Regulation 2 of 1877. Mr. Raghunath then argues that a wrong inference has been drawn from it since "properties" means immoveable properties and what was alleged to be stolen was movable property. It appears however from the judgments of both the Courts that what was alleged to be stolen was old building materials of a dilapidated building. This ground therefore fails. Accepting the finding of fact Mr. Raghunath then argues that the innocence of the plaintiff is irrelevant in an action for malicious prosecution and cites *Balbhaddar Singh* vs. *Badri Sah*[1]. In that case the Judicial Commissioners of Oudh had stated:

(1) 1926 P C 46r

"In an action for malicious prosecution the plaintiff has to prove:

(1) That he was prosecuted by the defendant.

(2) That he was innocent of the charge upon which he was tried.

(3) That the prosecution was instituted against him without any reasonable and probable cause.

(4) That it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect"

There Lordships remarked.

"Proposition (2), as stated, is quite erroneous. It should be

That the proceedings complained of terminated in favour of the plaintiff, if from their nature they were capable of so terminating".

This means that proof of plaintiff's innocence is not in all cases necessary for success in an action for malicious prosecution. It does not mean that the question of the falsity of the plaint may not arise in considering the third proposition, namely, whether the prosecution was instituted against the plaintiff without reasonable and probable cause. In that particular case it was alleged that the principal defendant had instigated a third person to make a confession charging the plaintiffs with murder, and Their Lordships later remarked. "The question is not. Did the appellants commit the murder ? or, did Badri Sah invent the murder agaisnst them ? the two queries exhausting the possibilities of the situation. The question is: Have the appellants proved that Badri Sah invented and instigated the whole proceedings for prosecution" ?

4. It is clear that the question whether the falsity or otherwise of the complaint is relevant will depend on the pleadings. If A alleges that B instigated C to make a false complaint against him and B does not assert that the complaint was true but denies the instigation then the falsity of the complaint is not relevant and what is relevant is the question of instigation *Balbhaddar Singh* vs. *Badri Sah* was a case of that nature. But if as here A alleges that B made a false and groundless complaint against him and B admits the complaint but denies that it was false, then the truth or falsity of the complaint is obviously relevant, and if it is proved that the complaint was not only false but false to the complainant's knowledge then the Court may infer want of reasonable and probable cause from these findings alone. That was the view taken by Jai Lal J. in *Jiwan Das* vs. *Hakumat Rai*[1] and I am in complete agreement with him. It further follows that if the plaintiff fails to prove the falsity of the complaint then there is nothing from which the Court can infer want of reasonable and probable cause. Therefore in the present case plaintiff having based his allegation of want of reasonable and probable cause entirely on the falsity of the complaint and having failed to prove that the complaint was false his action must fail and a remand is unnecessary.

5. I confirm the decrees of the Courts below and dismiss this appeal with costs.

Appeal Dismissed.

(1) 15 Lah. 262=1933 Lah. 461.

Law Points in Certain Cases.

**The Thikana Khetri* vs. *Rati Ram Ghisa Ram and Co.*

First Appeal and Cross Appeal Nos. 5 and 6 of 1933, decided on July 24, 1934, against the decree dated January 31, 1933, passed by the District Judge, MountAbu, in suit No 7 of 1927.

Civil Procedure Code—O VIII R 6—In suit for accounts Defendant entitled to amount found due to him against Plaintiff, without claiming it as a set off.

If Plaintiff sues for accounts, he impliedly undertakes to pay to the defendent any thing that may be found due on accounts being taken and defendant need not specifically pray for a decree. Deft's claim not being a set off no question of Court Fees or Limitation arises. *32 A. 525, 14 C. 147* (at P 152), *54 M. 654=1931 Mad. 185* **Foll.**, *46 A. 858=1924 All. 854* (2) **relied upon.**

Mount Abu—Interest Act—Not applicable to Mount Abu.

Interest Act does not apply to Mount Abu (*vide* Notification No. 284—I dated 24th April 1929—IV—Mac. 75).

Mount Abu—Does not form part of British India.

The District of Mount Abu is leased from the Sirohi State and it does not form part of British India.

Civil Precedure Code—Sec 35—Practice at Mount Abu.

No rules, regulating the assessment of counsel's fee in Mount Abu, have been prescribed The matter therefore lies in the discretion of the Court. Special circumstances demand special rules

Para 55 of the judgment reads as under

"55. The question of the scale of costs presents some difficulty. Mount Abu is peculiar in that there is no resident Bar and for a suit of importance it is necessary to procure counsel from outside. In the present case counsel were obtained from Ajmer. Mr Raghu Nath states that his clients have spent over Rs 4000 - in counsel's fees whereas the counsel's fee in the bill of costs attached to the decree

Rs. 336/12/-. No rules regulating the assessment of counsel's fee in Mount Abu have been prescribed and the matter therefore lies in the discretion of the court. Special circumstances demand special rules and I think it would be equitable to allow Rs. 25/- (i.e. 2nd class return fare plus motor car expenses) for each separate attendance of counsel in Abu, subject to the provisions (*a*) that the amount can be claimed for one counsel only and (*b*) that the total claim for journey expenses of counsel shall not exceed Rs. 500/-."

R.B. Mithan Lal Bhargava and Mr. Sri Lal Agarwal—for Thikana Khetri.

Messrs. Raghu Nath Agarwal and Jawand Lal Dutt Chowdhry—for Rati Ram Ghisa Ram.

**Jodh Raj* vs. *Ramzani and others.*

Small Cause Court Revision No. 36 of 1934, decided on July 24, 1934, against the order, passed by Court of Small Causes, Ajmer in Suit No. 3419 of 1933, on January 31, 1934.

Contract Act—Sec. 60—Creditor's right of apportionment—Subsequent amendment.

(i) The creditor's right to apportionment arises only when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied.

(ii) Once it has been held by the Court that any sum, which the plff. appropriated to a certain khata, should not have been so appropriated, the plaintiff is justified in amending his accounts.

Mr. Jasoda Nandan Bhargava—for Applicant.

R.B. Mithan Lal Bhargava for Opposite Party.

Amar Chand vs. *Kana and Pokar.*

Second Appeal No. 42 of 1934, and Cross Appeal No. 29 of 1934, decided on August 2, 1934, against the decree, passed by Additional District Judge in Appeal No. 82 of 1933, dated February 16, 1932.

C. P. Code—S. 100—New point cannot be raised which cannot be settled without a finding of fact.

It is not open to a party in Second Appeal to raise a new point which cannot be settled without a finding of fact either in the trial Court or in the lower appellate Court.

Contract Act—S. 74—If rate of interest penal, interest at reasonable rate ought to be awarded.

If the rate of interest is found to be penal, the Court ought to award interest at a reasonable rate.

Mr. Ghisu Lal—for Appellant.
Messrs. Jagan Nath Sharma and Raj Narain.—for Respondents.

B. B. & C. I. Ry. vs. *Mst. Bail Mooli.*

Misc Civil Appeal No. 1 of 1934, decided on August 2, 1934, under S. 30 (a) of Workmen's Compensation Act against the order of Commissioner, dated February 19, 1934.

Workmen's Compensation Act (1923)—S. 2 (1-d)—Adoptive mother is 'defendant'.

An adoptive mother is a 'dependant', *1931 Rang. 173 and 1931 Lah. 390* **Ref.**

Mr. Kishan Swarup Mathur—for Appellant.

COMMITTEE.

1. Mr. Suresh Chandra Mahresh.
2. Mr. Bridhi Chand Lakhotia.
3. Mr. Hira Lal Jain.

he editor is grateful to Mr. Jawand Lal Dutt Chowdhry for having read the second proofs.

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Alphabetical Index of cases reported.

(*Indicates that the Judgment is not printed but only the *Law Point*, arising in it, is published).

N.B.—The Subject Index *for this part* is not given as a consolidated Subject Index for the *whole volume* is given at the end of this Part.

BEFORE MR. E. WESTON, I C S.

B. P. Bhargava .... Plaintiff-Applicant.

Versus.

C. M. Shah & Co. .... Defendant-Opposite party.

Small Cause Court Revision No. 64 of 1934, decided on November 28, 1934, against the order of the Small Cause Court, Ajmer, passed on January 30, 1934, in suit No. 2560 of 1933.

Civil Procedure Code—S. 20 and O. 7, R. 1—Jurisdiction—Cause of action.

Plaint gives no indication as to how the cause of action arose within the court's jurisdiction. No mention as to where the price was payable. No evidence led upon the point. *Held*, as plaintiff has not attempted to show that money was payable within the courts' jurisdiction and not to his agent or convasser who made the contract at Umreth in the Bombay Presidency, the court had no jurisdiction.

Mr. Shyam Sunder Bhargava—for Applicant.

Mr. Jawand Lal Dutt Chaudhry—for Opposite party.

Judgment.—This is a suit for damages and interest for refusal by the defendent firm to take delivery of goods ordered by them from plaintiff's firm.

It is admitted that defendant had placed with plaintiff's agent or convasser in January 1930 an order for goods identical with those sent by plaintiff in April 1930 upon which this action is based. The order given in January is evidenced by the document exhibit D/1 It is admitted that this order was given to plaintiffs agent or convasser not at Ajmer but at Umreth in the Bombay Presidency where the defendant firm carries on business It is not asserted before me that exhibit D/1 was not a complete contract. It is claimed by plaintiffs that exhibit D/1 was cancelled and that the real contract is contained in the post card exhibit P/1, dated 1st April 1930, received at Ajmer by plaintiffs from defendants.

The Small Cause Court has held that the contract was entered into at Umreth by exhibit D/1 and not by exhibit P/1 at Ajmer, and that it has no jurisdiction to try the suit.

There is no evidence that the contract exhibit D/1 was cancelled. It is clear from perusal of exh. P/1 that it does not represent the contract, but is merely a reminder of a contract already existing. As there is no evidence of any other, the finding that the contract between the parties was that evidenced by exhibit D/1 is correct.

As the argument for applicant has been directed solely to showing that the contract was exhibit P/1, further consideration is hardly required. I may mention that the plaint gives no indication as to how the cause of action is said to have arisen at Ajmer. There is no mention as to where the price was payable, nor has any evidence been led upon the point. Although plaintiffs sent the railway receipt to defendants by V. P. P., which they refused to accept, it appears that in exhibit D/1 the printed condition that receipt should be sent by V. P. P. has been crossed out.

Defendant denied that any cause of action had arisen in Ajmer. As plaintiff has not attempted to show that money was payable at Ajmer and not to his agent or convasser who made the contract, the decision of the Small Cause Court that it had no jurisdiction to try the suit is correct.

The application is dismissed with costs.

Revision dismissed.

BEFORE MR. E. WESTON, I.C.S.

Maula Bux and another .... Plaintiff-Applicant.

Versus.

Sobhag Mal and others ... Defendants-Opposite party.

Civil Revision No. 70 of 1934, decided on November 27, 1934, against the order passed by the Sub-ordinate Judge, Beawar, on March 20, 1934, in suit No. 158 of 1931.

Civil Procedure Code—O. 33, Rule 1—Suit instituted on payment of court fees—Court holds court fees inadequate and directs payment of additional court-fees—Plaintiff unable to pay by reason of poverty—He can apply to continue the suit in forma pauperis.

A plaintiff is entitled to seek leave to continue in forma pauperis a suit already filed by him when by reason of poverty he is unable to comply with an order directing additional court fees to be paid, *60 C. 527*, and *53 M. 43*, **Followed.**

Civil Procedure Code — O 33, Rule 5,—Grounds of rejecting application.

The grounds upon which an application to continue a suit in forma pauperis can be rejected are those given in O. 33, Rule 5 so far as they are applicable.

Civil Procedure Code—SS. 105 & 115—Maintainability of Revision when appeal lies from decree.

Although instances exist where High Courts have interfered in Revision when relief possibly could have been obtained at a later stage by appeal, the general principle is that "where an appeal is provided, the court will not interfere by any peremptory order with the ordinary course of adjudication save in cases wherein a defeat of law and a grave wrong are manifest and are irremediable by regular procedure," *7, B. 311; 1 A. M. L. J. 1; 1 A M. L. J. 28, 3 A. M. L J. 53 (at page 56); and 5 A. M. L. J. 97 (at page 98)*, **Foll.**

The Subordinate judge dismissed the application to continue the suit in forma pauperis and also dismissed the suit under O. 7. R 11, *held*,

Revision does not lie because the applicant acquired a right of appeal when the suit was dismissed. In appeal from the decree it was open to applicant to set forth a refusal to consider his pauper application on its merits as a ground of objection.

Mr Moti Prasad Mehra—for Appellant.

Mr. Jasoda Nandan Bhargava—for Respondent.

Judgment.—The facts giving rise to this application are as follows. Applicants filed suit No. 158 of 1931 against respondents seeking a declaration that they were entitled to a two-third's share in certain property, and for a declaration that certain mortgages and a decree obtained upon those mortgages by defendant No. 1 were inoperative to the extent of plaintiff's share in the property.

In the written statement filed on 16th February 1932 defendant No. 1 among other contentions pleaded that the plaint was insufficiently stamped.

Issues were framed and the suit was set down for hearing in July 1932. On the date of hearing it was adjourned as the Sub-Judge was engaged in election work, and on further dates it was adjourned for various reasons until 23rd May 1933, when it was decided that the question of court fee should be taken up as a preliminary issue. Arguments on this issue were heard on 8th August 1933 but no order was passed until 5th March 1934, when it was held that court fee was payable not as on a simple declaratory suit but upon two-thirds of the value of the property. Plaintiffs were allowed 15 days to pay the deficient fee, and it was ordered that "failing payment, the plaint shall stand rejected under Order 7 Rule 11 C. P. C."

Within the period of 15 days allowed, an application signed by plaintiffs was presented through their pleader

purporting to be made under section 151 C. P. C. read with O. 33 Rules 2 and 3, stating that plaintiffs on occount of poverty were unable to pay the additional Court fee required, and praying that the Court should allow them to continue the suit in forma pauperis. The application contained a schedule of property said to be in possession of plaintiff No. 1, while plaintiff No. 2 was said to possess no property save her wearing apparel.

The material part of the order passed by the Sub-Judge on this application is as follows :—

> "The plaint in the suit was presented on 19th March 1931, and there was never in any shape or form any question of pauperism now sought to be set up and availed of in order to be exempted from payment of proper Court fees now required, without which the suit continued to proceed so long The defendant No 1 holds a decree execution of which has been stayed, this being a suit for declaration. The facts are fully given and stand considered in order dated 5th March 1934 which is sought to be evaded I am by no means persuaded of the bona fide character of this application which is only a garb and a pretext for further protracting the proceedings without even paying the necessary court fees. The circumstances of the case apparent on the face of the record, admit of no further toleration of protraction of proceedings to the decree holder's harassment unless it definitely appeared that the plaintiff applicants were conducting their case bona fide and in earnest.
>
> I dismiss this application. As the last day for payment of court fees required is to-day, the plaint under orders of 5th March stands rejected."

I think it can be taken as settled law that a plaintiff is entitled to seek leave to continue in forma pauperis a suit already filed by him when by reason of poverty he is unable to comply with an order directing additional court fee to be paid (*Hafiz* v. *Fateh Nasib*[1], *Subba Rao* v. *Venkataratnam*[2]). The grounds upon which such an application can be rejected will be those given in Order 33 Rule 5 so far as they are applicable.

An objection however has been taken for respondent that the present revision application does not lie, since the suit was dismissed under Order 7 Rule 11 and an appeal lay from that order of dismissal.

In the Calcutta case quoted above the High Court had interfered in revision with an order rejecting an application to continue a suit in forma pauperis, but it does not appear that an order dismissing the suit had been passed, that is to say that any decree was in existence. In the Madras case there was an appeal to the High Court.

The circumstances under which the High Court should exercise its powers of revision were discussed elaborately by a Full Bench of the Bombay High Court (*Shiva Nathaji* v. *Joma Kashinath*.[3]) Certain general principles were laid down, of which the fourth is

> "Where an appeal is provided, the Court will not interfere by any peremptory order with the ordinary course of adjudication save in cases wherein a defeat of the law and a grave wrong are manifest, and are irremediable by the regular procedure."

Although instances exist as in the Calcutta case quoted above where High Courts have interfered in revision when

(1) 60 C 327, =1934 Cal 23   (2) 53 M. 43 =1929 Mad 825.
(3) 7 B 341.

relief possibly could have been obtained at a later stage by appeal, the above rule undoubtedly represents the general practice followed by the High Courts. That it has been followed substantially by this Court even in cases where revision has been allowed from interlocutory orders appears from the following cases *Raja Didarbux* v. *Pir Molana*[1], *Moti Lal* v. *Mitsui Bhusan Kaisha Ltd.*[2], *Khadims of Durgah Khwaja Sahib* v. *Dewan Syed Ale Rasul Khan and others*[3], *Ghokal Chand* v. *Manager Mehrun Kalan Estate*[4].

In the present case applicant acquired a right of appeal when his suit was dismissed. This order amounted to a decree. The cases quoted for applicant in which revision was allowed from orders rejecting applications to sue in forma pauperis do not apply since in those cases there was no decree and in fact no suit. In appeal from the decree it was open to applicant under section 105, Civil Procedure Code, to set forth a refusal to consider his pauper application on its merits as a ground of objection. His wrong was remediable by the regular procedure.

For this reason I must decline to consider an application in revision. It is dismissed with costs.

Revision dismissed.

BEFORE MR. E. WESTON, I.C.S.

Moti and *another* .... Defendants—Applicants.

Versus.

Poosa and *another* ... Plaintiff—opposite parties.

Small Cause Court Revision No. 84 of 1934, decided on November 27, 1934, against the Judgment of Small Cause Court, Ajmer, passed on March 29, 1934, in suit No. 4304 of 1933

(1) 1 A. M. L. J. 1. (2) 1 A. M. L. J. 28
(3) 3 A. M. L. J. 53 (at p. 56) (4) 5 A. M. L. J. 97 (at p. 98).

Limitation Act—Art 75—Default makes the whole amount payable on the date of default.

Where the money borrowed was payable in instalments and it was provided that upon default of payment of three instalments the whole amount of the loan should be payable at once, the third default made the whole amount payable on the date of default. Defendant was not entitled to revert to the original agreement as to instalments either for purposes of pleading that amounts were not due or for purposes of limitation.

Mr Daya Shanker Bhargava.—for Applicant.

Mr. Gajendra Nath Bhargava.—for Opposite party.

Judgment.—Plaintiffs sued on an instalment bond dated 30th June 1926 The money was payable in small half-yearly instalments commencing from December 1926, and it was provided among other conditions as to interest that upon default of payment of three instalments the whole amount of the loan should be payable at once. No instalments were paid, but in June and July 1930 amounts of interest were paid and the payments entered on the bond under the signatures or thumb marks of defendants.

In the present suit on the bond it was pleaded that the instalments due in January 1926 and June 1927 were time barred as the payment of interest was not made within three years of the date of the June instalment. The Small Cause Court held that time ran from the date of the third default in respect of the whole amount of the bond.

I consider that this view is correct. Article 75 of the Limitation Act applies and the third default made the whole amount payable on the date of that default. Defendant is not entitled to revert to the original agreement as to instalments either for purposes of pleading that amounts are not due or for purposes of limitation.

The application is dismissed with costs.

Revision dismissed.

BEFORE MR. E. WESTON, I.C.S.

Mohammed Hanif, Syed .... Defendant—Appellant.

Versus.

1. *Syed Habib Husain* .... Plaintiff—Respondent.
2. *Mst. Rabia Bibi* .... Defendant—Respondent.

Civil Second Appeal No. 47 of 1934 decided on November 10, 1934, against the decree passed by Special Additional District Judge, Ajmer, on March 27, 1934, in Appeal No 212 of 1933.

Limitation Act—S. 14- Scope.

A plaint was filed in the Court of Small causes which ordered that the plaint be returned on the ground that the suit was not cognisable by it. It was then filed in the court of Subordinate Judge. *Held*, Plaintiff is entitled to exclude the time occupied by the Small Cause Court, in determining whether or not it had jurisdiction, *70 I C. 613. Foll.*

Limitation Act—S. 3—Starting point is date of Institution and not restoration.

A suit is dismissed for default and then restored. Limitation is to take effect from the date when the suit was filed and not from the date of restoration

Civil Procedure Code— S. 149—Payment of deficient court-fees.

Payment of deficient court fees within a period allowed by the court has the same effect as if the fee had been paid in the first instance.

Mr. Jasoda Nandan Bhargava—for Appellant.

Mirza Abdul Qadir Beg—for Respondent.

Judgment.—The only question in this appeal is one of limitation. The material facts are as follows.

Mst. Rabia was divorced from appellant Mohammed Hanif on 26th April 1925 and on that date a document was drawn up providing that the dower Rs 500 - should be paid to Mst. Rabia in four yearly instalments, the first being

payable on 21st January 1926. As nothing was paid Mst. Rabia filed a suit in the Court of Small Cause on 20th April 1928 for recovery of the three instalments then due. On 1st May 1928 she transferred her claim to present respondent Habib who was substituted as plaintiff on 23rd May 1928. On 13th April 1929 the plaint was ordered to be returned on the ground that the suit was not cognisable by the Small Cause Court. It was then filed in the Court of the First Class Sub-ordinate Judge on 12th July 1929 with an application stating that it had actually been returned by the Small Cause Court only on that day. On 26th August 1929 the suit was dismissed for default of appearance by plaintiff. On 2nd September 1929 an application was put in for restoration, and the suit was restored to file on 27th September 1929 although no reason for the default appears either in the application or in the order allowing restoration. Full Court fee was not paid until 20th January 1930 and on that day the suit was registered.

It is argued for appellant that the suit must be taken to have been filed on 20th January 1930, or at least on 12th July 1929.

This argument does not appear to have been raised in the Lower Courts.

I think it must be accepted that the proceedings in the Small Cause Court were filed bona fide. Under section 14 of the Limitation Act, plaintiff is entitled to exclude the time occupied by the Small Cause Court in determining whether or not it had jurisdiction, *Maryam Bibi* and *others* vs. *Ram Das* and *others*.[1] It is true that exclusion of this time was not pleaded specifically when the plaint was filed in the Court of the First Class Sub-ordinate Judge, but the proceedings in the Small Cause Court were referred to, and the original plaint on which no question of limitation could arise was filed The plea of limitation in the written statement is

(1) [illegible] I. C. [illegible] All. 461

made in the vaguest possible terms. I am not prepared to hold that plaintiff cannot now be permitted to meet the objection as to limitation.

The order of restoration after dismissal for default restored the suit. I am not aware that it has ever been held that limitation is to take affect from the date of restoration and not from the date when the suit was filed.

Under section 149 Civil Procedure Code payment of deficient Court fee within a period allowed by the Court has the same effect as if the fee had been paid in the first instance. The argument that the suit must be taken to have been filed on 20th January 1930 has no force.

In the circumstances I must hold that no part of the claim was barred by limitation. The appeal is dismissed with costs.

Appeal dismissed.

BEFORE MR. E WESTON, I C S.

Kan Mal and *another* .... Plaintiff—Appellants.

Versus.

Asa Nand and *another* .... Defendants—Respondents.

Civil Second Appeal No. 52 of 1934, decided on November 14, 1934, against the decree passed by the Special Additional District Judge, Ajmer, on April 21, 1934, in Civil Appeal No 15 of 1934

Civil Procedure Code—S. 100—Construction of a document is question of law.

The question of the construction of a document is a question of law which may be taken in Second Appeal, *2 A. M. L. J. 38, Foll.*

payable on 21st January 1926. As nothing was paid Mst. Rabia filed a suit in the Court of Small Cause on 20th April 1928 for recovery of the three instalments then due. On 1st May 1928 she transferred her claim to present respondent Habib who was substituted as plaintiff on 23rd May 1928. On 13th April 1929 the plaint was ordered to be returned on the ground that the suit was not cognisable by the Small Cause Court. It was then filed in the Court of the First Class Sub-ordinate Judge on 12th July 1929 with an application stating that it had actually been returned by the Small Cause Court only on that day. On 26th August 1929 the suit was dismissed for default of appearance by plaintiff. On 2nd September 1929 an application was put in for restoration, and the suit was restored to file on 27th September 1929 although no reason for the default appears either in the application or in the order allowing restoration. Full Court fee was not paid until 20th January 1930 and on that day the suit was registered.

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(1) 73 I. C. 611=1922 A. L. J. 461

made in the vaguest possible terms. I am not prepared to hold that plaintiff cannot now be permitted to meet the objection as to limitation.

The order of restoration after dismissal for default restored the suit. I am not aware that it has ever been held that limitation is to take affect from the date of restoration and not from the date when the suit was filed.

Under section 149 Civil Procedure Code payment of deficient Court fee within a period allowed by the Court has the same effect as if the fee had been paid in the first instance. The argument that the suit must be taken to have been filed on 20th January 1930 has no force.

In the circumstances I must hold that no part of the claim was barred by limitation. The appeal is dismissed with costs.

Appeal dismissed.

BEFORE MR. E WESTON, I.C.S.

Kan Mal and *another* .... Plaintiff—Appellants.

Versus.

Asa Nand and *another* .... Defendants—Respondents.

Civil Second Appeal No. 52 of 1934, decided on November 14, 1934, against the decree passed by the Special Additional District Judge, Ajmer, on April 21, 1934, in Civil Appeal No 15 of 1934.

Civil Procedure Code—S. 100—Construction of a document *is question of* law.

The question of the construction of a document is a question of law which may be taken in Second Appeal, *2 A. M. L. J. 38; Foll.*

In appeal the learned Special Additional District Judge has upheld the Sub-Judge's order.

The decree-holders have appealed to this Court.

It seems to be settled that the question of the construction of a document is a question of law which may be taken in second appeal. I may refer to the case, *Lal Chand* vs. *Ghisu Lal*[1], in which the construction of a decree also relating to an injunction as regards easements of air and light was taken up in second appeal.

It appears that three small apertures G, H and I which are on the same level and fairly close together had been closed by the flat roof of defendants' house. This roof is at a level slightly higher than the tops of these apertures and it extends up to the wall in which the apertures are placed.

The situation now existing is difficult to describe but is shown well in a photograph supplied at my request by respondents, to the accuracy of which appellant have not taken exception. In what they claim to be compliance with the decree respondents have made three scoops in their roof each leading down to one of the three apertures. Each makes a small inclined plane at the correct angle of 45° to the vertical. At the level of respondents' roof each inclined plane is wider than the aperture to which it leads. Between the the scoops there remain portions of the roof, and on each of these two portions of roof have been constructed pillars, the purpose of which, I understand, is to support constructions at a higher level made to block other apertures of plaintiffs' house to prevent further rights of easement being acquired.

I think it is clear that the decree passed in question did not consider the apertures G, H and I individually but as one whole. The injunction did not contemplate three separate small wedges of widths equal to the widths of the three

(1) 2 A M L J 38

apertures, but one wedge having as its base the line between extreme points of the bases of the three apertures, that is having as base the line X Y (the letters are mine) in the plan D/11. In this wedge with base X Y between the wall and the plane at 45 to the wall respondents were prohibited from making or retaining any "obstructions" to light and air passing to the apertures.

It is argued for respondents that although the pillars and the portions of roof between the apertures are constructions within this wedge, yet they are not obstructions to light and air. It is claimed that light travels in straight lines, and that the widening of the scoops at roof level has resulted in every ray of light passing into the apertures which would pass even if the portions of roof between did not exist.

I am prepared to concede that this may be approximately correct, although as a large proportion of the light within buildings is reflected light and not from direct rays of the sun, it certainly is not absolutely correct.

The injunction however refers not only to light but to air. It seems to me obvious that the ventilating powers of the apertures are seriously diminished by the existence of solid structures between them, which must prevent any circulation of air between them. Construction may be said not always to connote obstruction, but clearly as regards ventilation solid construction immediately at the side of an aperture must produce obstruction.

I consider that the objections of appellants to the alleged conformity with the decree are well founded in respect of the apertures G, H and I and this is sufficient to dispose of the appeal.

I allow the appeal. The proceedings are returned to the original Court with the direction that the execution

application be disposed of on the basis that solid constructions immediately between the apertures G, H and I and equally between the apertures V, W and X (if any) form obstructions to air, and are prohibited by the decree. It does not appear necessaay to consider whether the higher portions of the pillars form any obstruction. Presumably the removal of the intervening portions of roof will entail their demolition.

Appellants must be allowed their costs up to date in this Court and in the Courts below.

Appeal allowed.

BEFORE MR. E. WESTON, I C S.

Fatma, Mst. .... Defendant—Appellant.

Versus.

Syed Fakhruddin and others .... Plaintiffs—Respondents.

Civil Second Appeal No 55 of 1934, decided on November 10, 1934, against the decree passed by the Additional District Judge, Ajmer, on May 1, 1934 in Civil Appeal No. 216 of 1933.

Partition—Cause of action is recurring

A cause of action for partition is a legal incident of joint tenancy and recurs perpetually in favour of a joint holder.

Civil Procedure Code—S. 11, and O. 23, R. 1—Partition—Withdrawal of suit no bar to fresh suit.

A partition suit withdrawn under O. 23, R 1, without any determination of questions in issue, even without permission to file a fresh suit does not bar a fresh suit on the recurring cause of action, *46 A. 820*, and *28 A. 627*, *Foll.*

Practice—Partition suit—Question of improvements.

There is nothing improper in the order leaving the question of improvements to be investigated by the Receiver.

Mr. Abdul Rashid—for Appellant.

Mr. Ghisu Lal Dhanopia—for Respondents.

Judgment.—This appeal arises from suit No. 62 of 1928 filed by Fakruddin and Ghulam agaist present appellant. Plaintiffs claim that certain property and durgah rights belonged to one Ahmed Ali, great-grandfather of defendant appellant. Plaintiffs are descendants of a brother of the father of this Ahmed Ali.

On Ahmed Ali's death the property and rights devolved on his two sons, Ahsan Ali and Imdad Ali. Imdad Ali died leaving only a daughter's daughter, present defendant. Ahsan Ali had no issue, and is said to have died in the year 1918 at Hyderabad. Plaintiffs claim to be his heirs and to be entitled therefore to one-half share in the property and rights left by Ahmed Ali. The suit is for partition and accounts.

It may be mentioned here that plaintiffs had filed a similar suit in the year 1919 (suit No. 118 of 1919) claiming that Ahsan Ali had died at Hyderabad in the year 1918 and seeking partition of the property. In this suit no claim to a share in the durgah rights was made. This suit at an early stage was withdrawn by the mukhtar khas of plaintiffs without obtaining the permission of the Court for the filing of a fresh suit. The Court however by subsequent order set aside its order dismissing the suit on the withdrawal on the ground that the withdrawal was a compromise which the mukhtar was not competent to make, and proceeded to try the suit on its merits. It was dismissed as the death of A' Ali was held not to be proved.

In appeal the Additional District Judge agreed with the finding on the merits, but also held that the withdrawal was not a compromise, and that, even if it was, the mukhtar was competent to effect it, and held that the trial Court had no jurisdiction to restore the suit after its dismissal on withdrawal.

In the present suit the trial Court has passed a preliminary decree for partition of the property, but has disallowed the claim to a share in the durgah rights. An amount of Rs. 400 was allowed to defendant as the costs of improvements said to have been made by her.

In appeal the decree has been modified by the learned Additional District Judge. The claim to a share in the durgah rights has been allowed. Defendant has been ordered to furnish accounts of the property from 1st June 1925. The order allowing her Rs. 400 has been set aside, and it has been ordered that the amount to be allowed for improvements should be determined by the Receiver appointed to effect the partition.

Defendant has appealed to this Court.

The material grounds taken for appellant are

(1) That by reason of the withdrawal of the suit of 1919 without permission of the Court to file a fresh suit, the present suit is barred under Order 23 Rule 1.

(2) That by reason of the suit of 1919 the present suit is barred by res judicata.

(3) That the claim to a share in the durgah rights is barred under Order 2 Rule 2.

(4) That the variation of the original Court's order allowing Rs. 400 for improvements should not have been made.

For the first point I assume that the suit of 1919 was disposed of on the withdrawal application. Now a cause of action for partition is a legal incident of joint tenancy and recurs perpetually in favour of a joint holder. A partition suit withdrawn under Order 23 Rule 1 without any determination of questions in issue, even without permission to file a fresh suit, does not bar a fresh suit on the recurring cause of action. Authority analogous to this proposition may be found in the cases *Radhu Lal and others* vs. *Mul Chand* [1] and *Buleshar Das* vs. *Ram Prasad.* [2]

In the former it was held that dismissal of a partition suit on a compromise which appeared to be an agreement not to proceed with the suit did not bar a subsequent suit. In the latter a partition suit was held not to be barred by reason of an earlier suit dismissed for default.

The objection under Order 23 Rule 1 therefore has no force.

The question of res judicata arises if the suit of 1919 is considered as having been disposed of on the merits. It is, of course not correct to say that no questions of res judicata can arise in partition suits. For example if in the earlier suit it had been decided that plaintiffs were related to Ahsan Ali and were not his heirs, and it had been decided that in fact they were not his heirs, plaintiffs would be debarred from reagitating the question in the present suit. It is, however, not disputed that plaintiffs are the heirs of Ahsan Ali or that if Ahsan Ali is dead they have the rights they claim. Some colour to the plea of res judicata has been afforded by the statement in the present plaint that the cause of action arose in June 1918 when Ahsan Ali died. I understand that in the suit of 1919 the same cause of action was given.

(1) I. L. R. 46 A. 820. (2) I. L. R. 28 A. 627.

The case of plaintiff clearly depends not on the death of Ahsan Ali in the year 1918 but on the fact that he was dead at the time when the suit was filed that is in the year 1928. That this in no way makes out any new case for plaintiff appears from paragraph 7 of the plaint—

> "That now it is over ten years that the whereabouts of Ahsan Ali are not known. Therefore under Section 108 of the Evidence Act the death of Ahsan Ali can be legally established."

The decision in the earlier suit was that in the year 1919 Ahsan Ali legally was alive. This can be no bar to plaintiffs present case that in 1928 Ahsan Ali was dead.

The plea of res judicata therefore fails.

The objection under Order 2 Rule 2 in respect of the durgah rights equally can have no force. I notice it was given up before the first Appellate Court.

There is nothing improper in the order leaving the question of improvements to be investigated by the Receiver, and I see no reason to interfere with it.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

BEFORE MR. E. WESTON, I.C.S.

Sadiq Ali and another .... Applicants.

Versus.

Crown .... Opposite party.

Criminal References Nos. 36 & 37 of 1934, decided on October 9, 1934 in Criminal cases Nos. 26 and 28 of 1934 of the Court of the Additional Sessions Judge, Ajmer.

Penal Code—S. 279 – Proof of rash and negligent driving necessary.

There can be no doubt that riding a bicycle falls within the meaning of driving a vehicle, but if two persons ride on the same bicycle they are not necessarily likely to cause hurt to other persons using the road. It must be established that *in fact* the bicycle was not or could not have been under proper control before any inference as to danger to other persons could arise.

Criminal Procedure Code—S 243—Plea of guilty how to be recorded.

Particularly in cases where an act is an offence only when committed in certain circumstances, it is essential that a plea of guilty should contain admission not only of the act but also of the circumstances under which it was committed.

K. B Abdul Wahid Khan—for the crown.

Order.—These are two references under section 438 Criminal Procedure Code made by the Additional Session Judge, Ajmer, in cases where persons have been convicted by the City Magistrate under section 279 I. P. C. Each was a case of two persons riding in the public road on a single bicycle. The learned Additional Sessions Judge recommends that the convictions should be set aside,

Section 279 makes penal rash or negligent driving a vehicle on a public way to the common danger. There can be no doubt that riding a bicycle falls within the meaning of driving a vehicle, but I am not able to accept that if two persons ride on the same bicycle they are necessarily likely to cause hurt to other persons using the road It must be established that in fact the bicycle was not or could not have been under proper control before any inference as to danger to other persons could arise.

In Reference No. 36 the conviction appears to be based on the argument that there was other traffic in the road, and

that on a slope the bicycle was bound to swerve. There is no evidence that it did swerve, and I am not able to agree that the argument is conclusive.

In Reference No. 37 the accused were convicted on their pleas of guilty. The Public Prosecutor concedes that those pleas were not recorded in the manner prescribed by section 243 Criminal Procedure Code. Particularly in cases where an act is an offence only when committed in certain circumstances, it is essential that a plea of guilty should contain admissions not only of the act but also of the circumstances under which it was committed. The accused who sought the reference maintains that he admitted only the fact that he and the other accused rode on the one bicycle.

As remarked above this is not in itself sufficient to constitute the offence.

I think in the circumstances the convictions in both cases should be set aside. There will be an order accordingly The fines, if paid, should be refunded.

Reference accepted.

BEFORE MR. E. WESTON, I.C.S.

Ram Nivas, Pandit .... Applicant.

Versus.

Behari Lal, Pandit .... Opposite party.

Criminal Reference No. 38 of 1934, decided on November 10, 1934, in Criminal Case No. 29 of 1934 of the Court of the Additional Sessions Judge, Ajmer.

Criminal Procedure Code—S. 522—Scope.

It is enough if the Criminal force or intimidation is used at any stage before full possession was taken. It is also enough if the force or intimidation is used to any tenant or representative of the owner, and the presence of the owner is not essential, *1934 Lah. 454 and ? A. 185; Distinguished.*

Mr Moti Pershad Mehra—for Applicant.

R. B. Mithan Lal Bhargava—for Opposite party.

Order.—This is a reference by the Additional Sessions Judge under section 438 Cr P. C. recommending that an order under section 522 Criminal Procedure Code passed by the Honorary Second Class Magistrate, Beawar, which has been set aside by the Magistrate First Class, Beawar, in appeal, should be restored.

Opponent Behari Lal was convicted of criminal trespass, and the conviction was upheld by the appellate Magistrate.

It is true that the reasons given by the Second Class Magistrate for the order under section 522 are defective. He says "I think when an accused is punished for the offence of criminal trespass and grievous hurt he should return possession of complainant's land."

The accused was not punished for hurt, nor was there any finding that hurt had been caused.

At the same time the appellate Magistrate appears to have considered that an order under section 522 is justified only if the dispossession was effected by use of criminal force.

The evidence is to the effect that accused broke the lock of the enclosure surrounding the land. While he was doing so the tenant of complainant came up. On his

protesting he was threatened with a beating if he did not go away.

This witness has not been disbelieved, and it follows that while obtaining possession accused used criminal intimidation.

Under section 522 it clearly is enough if the criminal force or intimidation was used at any stage before full possession was taken. Also it is enough if the force or intimidation is used to any tenant or representative of the owner, and the presence of the owner is not essential. In the cases relied upon by R. B. Mithan Lal (A. I. R. *1934* Lah. 454 and ? Allahabad p. 185) no one on behalf of the owner was present.

On the facts I think the order of the original Court was justified although proper reasons were not given. As it was set aside for reasons which ignored the evidence in the case, I think it should be restored.

Order accordingly.

Reference accepted.

BEFORE MR. E. WESTON, I.C.S.

Abdul Aziz Palti .... Applicant.

Versus.

Crown .... Opposite Party.

Criminal Reference No. 57 of 1934, decided on November 29, 1934, in Criminal Revision No. 52 of 1934 of the Court of Additional Sessions Judge, Ajmer, decided by him on November 5, 1934.

Criminal Procedure Code—S. 342—Summons case—Non-examination of accused vitiates conviction.

In a summons case the omission by the Magistrate to examine the accused as required by S. 342 is an irregularity which vitiates the trial, *45 B. 672; 46 B. 441; and 54 C. 286, Foll. 46 M. 758; Not Followed.*

Criminal Trial—Practice—Summary trial.

In summary trials particulars of the examination of accused are to be entered by the Magistrate not by a Clerk and in the proceedings not in a diary.

Mr. Chand Karan Sarda—for Applicant.

Mr. Madan Mohan Kaul—for Opposite party.

Judgment.—This is a Reference under section 438 Criminal Procedure Code made by the Special Additional Sessions Judge on the application of one Abdul Aziz Palti, who with another person, was convicted by the City Magistrate, Ajmer, under section 160 I. P. C. and sentenced to pay a fine of Rs 15 The Additional Sessions Judge recommends that the conviction and sentence of applicant should be set aside on account of illegalities of procedure adopted by the Magistrate and also on the merits of the case.

The legal objections to procedure are

(1) That the Magistrate changed his procedure from that of a regular trial to that of a summary trial to the prejudice of the accused.

(2) That the Magistrate omitted to examine the accused as required by section 342 read with section 364 Criminal Procedure Code.

There is no force in the first objection. The evidence was recorded throughout as in a regular trial, and the only trace of summary procedure is to be found in the judgment

or order pronounced. For some reason this was written in the register maintained for summary trials. It recites that the fact of a fight taking place in a public place is admitted and that the question for determination is who took part in the fight. Then follows a brief discussion of the evidence particularly the statements made by the two accused. It cannot be said to be inadequate as a judgment in the regular trial of a petty case such as the present.

Accused have not been prejudiced in any way. Their sentences were not appealable in any circumstances. In effect the trial was not summary but regular.

The second objection raises a point of some importance, namely whether section 342 Criminal Procedure Code applies to summons cases. On this the opinion of the High Courts is not unanimous. In *Emperor* v. *Fernandez*[1] and *Emperor* v. *Gulab Jan*[2] the Bombay High Court held that the section applies to summons cases. A Full Bench of the Madras High Court dissented from this view in *Ponnusamy* v. *Ramasamy*.[3] This case was considered by the Calcutta High Court in *Bechu Lal Kayastha* v. *Emperor*[4] and the view of the Bombay High Court was adopted. This view also seems to have been adopted by other High Courts in cases which have not appeared in the authorised reports, while I understand the Rangoon High Court recently has followed the Madras ruling. I am not aware of any pronouncement by this Court on the question.

In my opinion the view of the Bombay High Court is correct. I can see no justification for limiting the general application of section 342 Criminal Procedure Code by investing the expression "before he is called on for his defence" with a technical meaning. No doubt such an

(1) I. L. R 45 B. 672=1921 Bom. 374.
(2) I L R 46 B. 441=1922 Bom 290.
(3) I L R. 46 M. 758=1924 Mad. 15 (F B)
(4) I. L. R 54 C. 286=1927 Cal. 250.

expression appears in section 256 relating to warrant cases while it is not found in the chapter dealing with summons cases, but in every criminal case an accused enters upon or is called on for his defence at some stage and the presumption which exists in favour of the innocence of an accused involves that ordinarily this stage occurs after the prosecution evidence has been concluded. I do not think examination of the accused throws any great burden on Magistrates. The time occupied in this examination will vary with the nature of the case. In a petty case this time should not be considerable.

In the present case no record appears of examination of the accused after the prosecution witnesses had been examined. There is a note in the case diary apparently in a clerk's writing and probably not written while the proceedings were going on, but initialled by the Magistrate. This note states that accused had nothing to add to their previous statements.

This is not compliance with section 364 Criminal Procedure Code. I have held that the trial was not summary, but even in summary trials particulars of the examination of accused are to be entered by the Magistrate not by a clerk, and in the proceedings not in a diary.

I must set aside the proceedings against both the accused. The learned Assistant Public Prosecutor presses that a fresh trial should be held since the conviction of applicant Abdul Aziz involves a question of security which I understand had been furnished by him under chapter 8 Criminal Procedure Code.

In the circumstances I direct that the case against both accused should be retried by such Magistrate as the District Magistrate may direct in this behalf.

Re-trial ordere

BEFORE MR. E. WESTON, I.C.S.

King Emperor .... Appellant.

Versus,

Kalyana and others .... Accused-Respondents.

Criminal appeal No. 7 of 1934, decided on October 18, 1934, against the order passed by the Additional Sessions Judge, Ajmer, in Sessions Case No. 1 of 1934.

Criminal Procedure Code— S. 164—Accused thinks Magistrate to be Police Officer— Confession not invalid.

If while making a confession an accused thought a Magistrate to be a Police Officer, his confessional statement would not be invalidated on that account.

Criminal Procedure Code—S. 164—Inquiry and warning.

It is the duty of Magistrates to satisfy themselves that confessions recorded by them have been given voluntarily, but no particular form of inquiry is prescribed by law.

Criminal Procedure Code—S. 164—Retracted confession must be materially corroborated.

If confessions are retracted, it is an ordinary rule of prudence to look for material corroboration of those confessions.

Criminal trial—Evidence—Appreciation of—Value of leading cases.

No number of cases leading or otherwise can provide a mechanical substitute for that personal appreciation of evidence which is vital in the administration of justice.

Criminal trial—Evidence—Appreciation of.

The circumstance that an accused person buried an ornament is not proof that the ornament belonged to any particular person.

Criminal trial—Evidence—Appreciation of—Identification of articles of ordinary make by persons who have used them

Persons who have worn for a considerable time garments or ornaments, of ordinary make which bear no special marks of identification, very often are able to identify them satisfactorily by reason of the familiarity of long association which often they are not able to describe in terms of special or distinguishing marks.

K. B. Abdul Wahid Khan—for Appellant.

Mr. Sri Lal Agarwal--for Accused.

Order.—Six accused persons were committed to the Court of Sessions on a charge of dacoity, and have been acquitted on 9th April 1934 by the Additional Sessions Judge, Ajmer.

The present appeal from the order of acquittal has been filed under section 417 Cr. P. C. by the Public Prosecutor under orders from the Chief Commissioner, Ajmer. The appeal as filed applied equally to all six accused persons, but it was admitted only in respect of three, by name Kalyana, Ghisa and Gila. Notice has been issued to these three only, and the order of Norman J. C. must be construed as dismissing the appeal in respect of the others.

The prosecution case is that on the night of 7th November 1933 two carts laden with cotton left Nayagaon about 2 a m. for Kekri. One cart was driven by one Nanda and Kishenlal the owner of the cotton and cart, was sleeping in it. With the second cart were its owners, two brothers Dhula and Gokal. When about two miles from Nayagaon, six men with their faces muffled stopped the carts. From Nanda they took a dhoti and a silver kari or anklet which he was wearing. Kishenlal was searched but the men found nothing. From Dhula they took gold murkis and some money, and from Gokal a silver nawa or plaque. They also took six bundles of cotton from the two carts, and then left.

The two carts went on to Sadari arriving there about 3 a.m. There a chowkidar and some other persons were told what had happened, and the carts went on to Kekri where the remaining cotton was sold. No report was made at Kekri where I understand there is a Police station. Kishenlal returned to Nayagaon, and on 10th November is said to have been about to proceed to Sawar Police station, within the limits of which the offence had been committed, in order to report, when he was called by the Police who had received other information of the commission of the offence.

This information is said to have come from accused No. 1, Kalyana. This man is said to have been seen by a constable Chitar on 8th November about 10 p.m. with accused Ghisa and another man in the bazar at Sawar near sweepers' houses Chitar found their movements suspicious and attempted to arrest them, but succeeded in catching Kalyana only. The Sub-Inspector was informed and he put Kalyana in the lockup. On the following morning Kalyana is said to have given information about the dacoity which led to Kishenlal and the other persons, who had been with the carts, being called.

The houseof Gila was searched apparently on 10th and a silver kari was found in a niche and a dhoti in a receptacle for maize. These articles are said to have been identified by Nanda.

On 11th a silver plaque (nawa) is said to have been producéd by Ghisa from earth under a tree. This is said to have been identified by Gokal.

Some quantities of cotton also were found in houses of certain of the accused persons. The prosecution rely upon evidence that Ghisa had not cultivated cotton that year, but immediately after the dacoity had sold 37½ seers of cotton to witness Ladhuram.

All six accused made confessional statements before the First Class Magistrate Kekri; Kalyana on 11th November and the others on 13th November. I do not agree with much of the criticism of these confessions in para 12 of the Additional Sessions Judge's judgment. Accused Ghisa, Nania and Kalyana allege that they thought the Magistrate was a Police officer but other accused speak of him as a Magistrate. All accused were informed by the Magistrate that they were not bound to make a confession. I think it is unlikely that accused thought that the Magistrate was a Police officer, but if they did, their confessional statements would not be invalidated on that account. The second criticism suggests that it was the duty of the Magistrate to elicit the motive for making the confessions. It is the duty of Magistrates to satisfy themselves that confessions recorded by them have been given voluntarily, but no particular form of inquiry is prescribed by law. A stronger criticism would have been the omission to examine the accused for any signs of beating and the omission to make any inquiry as to their treatment in the hands of the Police. The third criticism that confessional statements have no value if the persons making them are returned to Police custody appears to be a principle deduced from some reported case. It should be remembered that cases are authority only for the facts with which they deal, and that the unauthorised law reports are particularly unreliable material from which to obtain hard and fast rules as to appreciation of evidence. Every case rests on its own merits, and no number of cases leading or otherwise can provide a mechanical substitute for that personal appreciation of evidence which is vital in the administration of justice.

In the present case it does not appear that the accused after their confessions were recorded were again placed under the influence of the investigating officer.

The confessions were retracted both before the Committing Magistrate and in the Sessions Court. In such

BEFORE MR. E. WESTON, I.C.S.

Gulab .... Appellant Accused.

Versus.

Crown .... Complainant.

Criminal Appeal No. 8 of 1934 and Criminal Revision Application No. 44 of 1934, decided on November 26, 1934, against the order passed by the Additional Sessions Judge, Ajmer, on June 28, 1934, in Sessions case No. 6 of 1934.

Criminal Procedure Code—S. 210—Charge in doubtful cases to be for serious offence.

In doubtful cases it is better for the Magistrate to leave reduction of the capital charge to the court which will try the case.

Criminal Procedure Code—S. 526—Altering the charge before the Sessions Court.

It is undesirable that accused persons on being brought before the Sessions Court should find themselves required to meet charges more serious than those on which they have been committed for trial.

Indian Penal Code—S. 304—Provocation reduces murder to culpable homicide only when it is both grave and sudden.

Provocation reduces murder to culpable homicide only when it is both grave and sudden.

K. B. Abdul Wahid Khan—for the Crown.

Order.—One Gulab son of Sheo Karan has been convicted under section 304 I. P. C. by the Additional Sessions Judge, Ajmer, and has been sentenced to seven years rigorous imprisonment. He is alleged to have caused the death of his wife Mst. Matki by striking her on the head with a heavy mallet.

He has appealed from jail claiming that he is innocent and that there is no direct evidence against him. A revision application also has been filed by the Public Prosecutor on

behalf of the Crown stating that the case properly was one of murder, that the Additional Sessions Judge erred in refusing to alter the charge under section 304 I. P. C. framed by the Magistrate to one under section 302 I. P. C. or in the alternative that the sentence be enhanced. The appeal and the revision application have been heard together.

The prosecution case is that about 11-30 A. M. on 27th January 1934 Gulab, Mst. Matki and their son Misri a boy about six years of age were in their house in Ajmer. The boy was writing on a slate and probably on account of lack of intelligence displayed by him Gulab gave him a slap. A quarrel ensued between Gulab and his wife and Gulab struck her with a mallet causing injuries which fractured her skull in two places. Gulab left the house leaving her dead and bleeding. Neighbours were attracted by the boy crying and two of them Abdulla and Jemal went to the police chowki which appears to be about a quarter of a mile from the house. Abdulla states in evidence that Misri said his father had gone away after striking (or killing) his mother. The Sub-Inspector came to the scene. The woman was lying dead There was a mallet near her feet stained with blood and with hairs adhering to it. The head was lying on a stone and upon another mallet. There was blood on the face and clothes and on the ground.

Gulab was found about 1 P M. in the courtyard of the police station by another Sub-Inspector who had been informed of the offence. He questioned Gulab as he answered to the description given of him and took him to the City Magistrate. On the way he noticed that there were blood-stains on Gulab's clothes and these clothes were attached.

The certificate of the chemical analyser shews that these clothes bore stains of human blood and also that the mallet found near the feet of the body was stained with blood in which were some hairs certified as ' identical with human hair."

The body was taken to the Victoria hospital and was examined by R. S. Suraj Narain, Assistant Surgeon, at 5 p.m. the same day. His evidence is that it had the following injuries:—

(1) blackening of the right eye with swelling.

(2) fracture of the lower jaw.

(3) a contused wound deep to the bone behind the left ear.

(4) a contused wound 1" by 1/8" by 1/6" on the left side of the scalp about 2" acove the left eye brow.

(5) the left temporal, parietal and upper occipital bones were broken into pieces.

(6) fracture at the base of the skull.

Death was due to these injuries. In his opinion the injuries were caused by two or three blows with a heavy blunt weapon. He considers the broken jaw was caused by the woman having been struck while lying on the ground.

From this evidence it is clear that the theory suggested by the defence that the injuries were caused by a fall against an iron object in the house is impossible. There seems no doubt that she was struck with the mallet and it seems most probable that she was struck at least two separate blows.

The direct evidence that it was her husband, Gulab, who struck her, is the statement of Misri before the committing Magistrate. In the Sessions Court the boy not unnaturally sought to exculpate his father by stating that his mother stumbled and fell on an iron kharwa lying in a corner. His statement before the Committing Magistrate was read as evidence under section 288 Cr. P. C. In this statement he gave the prosecution case already outlined.

His statement in the Sessions clearly is false and made with an obvious motive, while there is no reason at all why before the Magistrate he should have implicated his father falsely. Apart from evidence that he stated to the neighbours that his father had struck his mother, his statement before the Magistrate receives substantial corroboration from circumstantial evidence.

Misri was found crying in the house by neighbours. In both statements Misri says he was present when the tragedy happened When the theory of accident is discarded Misri had no motive to substitute his father's name for that of the real assailant. It was natural for Gulab to be in the house. The offence appears to have been committed in anger. There are no indications of robbery. There is no suggestion that anyone else came to the house or that anyone else had any motive for coming and attacking Mst. Matki.

Gulab in his statement before the Magistrate admits that he found his wife dead before he went to the Police station. He attributes any bloodstains on his clothes to touching her body. According to the evidence he did not go to the Police station until an hour after the matter had been reported. There is no evidence of his coming to the house after the neighbours became aware of the crime, and it seems impossible to believe that he could have done so without being observed. His visit to the house therefore must, I think, be taken to have been made before the matter was known publicly. His natural conduct if innocent was to have gone direct to the police station. His disappearance for an hour or more is most suspicious.

I find it impossible to believe that Misri could have remained quietly in the house with the bleeding corpse of his mother for any appreciable time. I think it must be taken that the neighbours became aware of what had happened very shortly after it occurred. Gulab's admission of a visit

to the house is practically an admission that he was present when the offence was committed.

I consider therefore that there is material corroboration of Misri's statement, and that it is sufficiently proved that it was Gulab who caused the injuries to Mst. Matki.

It remains to consider what offence he committed.

The case was sent up by the police under section 302 I. P. C. but the Committing Magistrate preferred to frame a charge under section 304. In doubtful cases it is better for the Magistrate to leave reduction of the capital charge to the Court which will try the case. It is undesirable that accused persons on being brought before the Sessions Court should find themselves required to meet charges more serious than those on which they have been committed for trial, and I have no doubt that it was consideration such as this which influenced the learned Additional Sessions Judge when declining to alter the charge. The reasons given by the Magistrate are far from adequate. Provocation reduces murder to culpable homicide only when it is both grave and sudden. There is nothing to shew that any provocation was grave. The Magistrate also did not indicate by his order or in the charge whether the charge was under the first or the second part of section 304 I. P. C.

The Additional Sessions Judge has held that the accused acted unthinkingly, which I take to mean that he acted without any intention of causing death or bodily injury likely to cause death, that is to say the conviction is one under the second part of section 304.

I agree with the learned Public Prosecutor that if it appears that the woman not only was hit on the head with a heavy mallet but was again struck on the head after she had fallen on the ground with such force as to break bones into

pieces the question whether the offence is not one of murder calls for serious consideration.

I am reluctant however to direct a fresh trial after this lapse of time, or to alter the conviction to one of murder when accused has not been represented by counsel before me. I am prepared to accept that the crime was committed in a sudden fit of passion, but the attack on a defenceless woman was brutal and unjustified.

I think it will be sufficient to maintain the conviction under the second part of section 304 I. P. C. but to enhance the sentence to the maximum of ten years rigorous imprisonment.

Order accordingly.

Appeal dismissed, sentence enhanced.

Law Points in Certain Cases.

**Chunni Lal* vs. *Sheo Prasad.*

Small Cause Court Revision No. 102 of 1934 decided on October 11, 1934, against the judgment passed by Small Cause Court, Ajmer, on April 30, 1934, in suit No. 3903 of 1932.

Provincial Small Causes Courts Act—Sec. 25—When interference in Revision.

Findings of fact will be interfered with only under exceptional circumstances, *45 B. 292 and 1925 A.M.L J. Supplt. 17 Referred.*

Interest—not to be allowed for mere detention of money.

The mere detention ef money in the absence of such circumstances as fraud or breach of trust is not a ground for awarding interest, *1934 A. M. L. J. 1*; *Followed.*

Mr. Anandi Pershad Bhargava—for Applicant.

Mr. Kaushal Das Deedwania—for Opposite party.

**Abdulla and others* vs. *Narain.*

Civil Second appeal No. 45 of 1934, decided on October 8, 1934, against the decree passed by the Additional District Judge, Ajmer, on April 14, 1934 in Appeal No. 247 of 1933.

Civil Procedure Code--S. 100—Findings of fact—Suit for malicious prosecution.

Questions (*i*) whether the complaint was false, (*ii*) whether it was malicious and (*iii*) whether it was made without reasonable and probable cause are questions of fact.

Civil Procedure Code—S. 100—Interference with decisions of facts.

A decision on facts can be attacked in Second appeal if it is based not on legal evidence but on mere conjectures Discrediting evidence on

general reasons only not affecting the credit of any particular witness is an error in law which allowed the superior court to interfere, *1928 Lah. 737; 1924 Lah. 465; and 29 I. C. 673. Foll.*

Mr. Mukat Behari Lal Bhargava—for Appellant.

Mr. Chand Karan Sarda—for Respondent.

**Babu* vs. *Crown*.

Criminal Reference No. 46 of 1934, decided on November 26, 1934, in Criminal Revision Application No. 44 of 1934 of the Court of the Additional Sessions Judge, Ajmer.

Criminal Procedure Code—S. 342 and S. 364—Scope.

A note in the case diary, made after conclusion of the cross-examination of the prosecution witnesses, that accused did not wish to make any further statement, is not compliance with section 342 read with section 364.

Criminal Procedure Code—S. 162—Scope.

During the final cross-examination of a prosecution witness, accused asked to be supplied with a copy of the witnesses police statement. The magistrate recorded an order: "A copy be allowed to the accused, not just now, but he should apply for it." *Held*, this is not compliance with Section 162 Criminal Procedure Code.

Criminal Trial—Non-compliance with the provisions of Section 162 or Sect'on 342 read with S. 364 vitiates the trial.

Non-compliance with the provisions of Section 162 Criminal Procedure Code or S. 342 read with S 364 are illegalities which are sufficient to vitiate the Magistrates Proceedings.

Mirza Abdul Qadir Beg--for Applicant.

Mr. Madan Mohan Kaul—for Opposite party.

END.

7. Translation and Comparison fees in Subordinate Courts.

Order, dated June 26, 1933, issued by the Commissioner and District Judge, Ajmer-Merwara.

Civil Court subordinates are at present allowed to charge *comparing fees* at the rate of -/2/- per Khata and -/-/6 per copy in the case of plaint. It is now ordered that these rates be reduced to half in each case with effect from the 1st July, 1933. In Insolvency cases the existing fees of -/1/- and -/-/3 per manuscript and typewritten copies respectively should continue to be charged as heretofore.

2. Plaints or written statements should not be *translated* except in the following cases.—

(1 A plaint presented in English where the defendant resides in a part of India where Urdu is spoken may be translated into Urdu, and from Urdu into English where he resides elsewhere *e.g.* in the Bombay Presidency.

(2) Where the presiding Judge is a European, Urdu pleadings may be translated into English *e g* in the courts of the Commissioner and the Assistant Commissioner.

8. Translation of Plaint in Suits.

Order, dated October 23, 1933, issued by the Commissioner and District Judge, Ajmer Merwara.

The following proviso may be added below clause (1) of para 2 of this office order dated the 26th June 1933,

"Provided that a plaint shall not be translated from English into Urdu if the plaintiff certifies that the defendant or defendants understand English."

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9. Translation in S. C. C Revisions

Circular, dated, July 11, 1933, issued by the Judicial Commissioner.

The Commissioner having recently passed orders that pleadings in Civil Suits shall no longer be translated into English, it is necessary to provide for translations in cases which come before the Judicial Commissioner in revision. It is therefore ordered that a party intending to

file a revision application in this Court under Sec. 25 of the Small Cause Courts Act must pay the translation fee to the trial Court, and file the receipt along with his application for revision. Applications filed without such receipt will not be accepted. These orders do not apply to suits in which the original plaint was filed prior to 1st July 1933.

10. Recording Confessions.

Circular, dated November 23, 1933, issued by the Judicial Commissioner.

The attention of all Magistrates empowered to record confessions is invited to the provisions of Sec. 164 Cr: P. C. In addition to explaining to the accused that he is not bound to confess and that his confession will be used in evidence against him a Magistrate may not record a confession unless upon *questioning the accused* he has reason to believe that the confession is voluntary. This duty is not discharged by asking the accused a single formal question: he should be questioned at some length and his motive for confessing ascertained. Not only should no police be present, but the accused should not ordinarily be handed back to the custody of the investigating police and he should be informed that he will not be handed back. Another useful precaution is to allow some interval between the preliminary questions to the accused and the recording of his statement. Attention is also invited to the form of certificate prescribed by the amending Act XVIII of 1923. In a recent case a Magistrate was found to have used the old form of certificate with the result that he had to be summoned to give evidence in court. The time of arrival of the accused before the Magistrate must also be accurately recorded. If precautions on these lines are taken the number of confessions which have to be rejected as inadmissible when the case comes to trial should be greatly decreased.

11. Process Fee in Judicial Commissioner's Court.

Circular, dated November 23, 1933, issued by the Judicial Commissioner.

It has been brought to the notice of the Judicial Commissioner that process-fee is sometimes not punctually paid. Members of the bar are reminded that if notice on the respondent is not served owing to the failure of appellant to deposit process fee the Court may make an order that the appeal be dismissed. (O. 41 R. 18). In future process fee should be paid within seven days of the date on which the appeal is admitted, and the appellant is responsible for ascertaining whether his appeal has been admitted at once or has been put down for preliminary hearing.

12 Verification of Securities.

Order, dated August 29, 1933, by the Commissioner and District Magistrate, Ajmer.

It has been reported to me that in connection with the verification of securities, petition-writers and clerks of Vakils often appear as identifying and verifying witnesses though in many cases they might not possess definite information about the properties of the sureties The Vakils concerned are, therefore, requested kindly to warn their Clerks that they should refrain from appearing as identifying and verifying witnesses except in cases in which they possess personal knowledge about the properties of the sureties.

13. Powers of Official Receiver.

Note from notification No. 792, dated June 13, 1934, issued by the Judicial Commissioner.

Powers conferred on the official receiver:

(1) to frame schedules and to admit or reject proofs of creditors.

(2) to hear and determine any unopposed or exparte application.

(3) This notification shall have force from 13th June, 1934.

14. Enrolment of Advocates and Pleaders

Rules for the enrolment of Advocates and Pleaders in the district of Ajmer-Merwara revised and corrected upto 30th September, 1934.

In exercise of the powers conferred by section 21(*d*) of the Ajmer Courts Regulation 1926 and section 41 of Legal Practitioners Act 1879, and in supersession of the Rules published in Notification No 397 of the 17th May 1927, the Judicial Commissioner with the previous sanction of the Chief Commissoner is pleased to make the following Rules for the admission of Advocates and Pleaders to practise in the Courts of Ajmer-Merwara.

2. The Judicial Commissioner may at his discretion and subject to the conditions hereinafter prescribed, enrol any person qualified under these rules as an Advocate or Pleader in the Civil and Criminal Courts of Ajmer-Merwara.

3 All applicants for enrolment must apply in writing to the Judicial Commissioner, stating their qualifications

(ii) An applicant for enrolment shall be a *bona fide* resident of Ajmer-Merwara or of the territories within the jurisdiction of the Judicial Commissoner, Ajmer-Merwara.

Provided that the Judicial Commissioner may for special reasons enrol an applicant residing elsewhere.

(iii) Every application for enrolment shall be accompanied by the applicant's diploma, or certificate and by two certificates of good character and conduct from persons of standing, as well as some evidence to show that the applicant can speak, read and write Urdu and Hindi, with ease and correctness, and also a certificate from the Secretary, Bar Association, Ajmer, that he is a bona fide resident of Ajmer-Merwara.

4. The following persons shall be eligible for enrolment as Advocates or Pleaders.

Advocates. (1) As Advocates—

(*a*) Pleaders enrolled under these Rules of three years standing:

Provided that if any such Pleader has been employed in the Government service as a Judicial, Executive, Revenue or Ministerial Officer, the period of his service as such shall count towards the said period of three years practice.

(*b*) Barristers of England or Ireland, or members of the Faculty of Advocates in Scotland.

Pleaders. (2) As Pleaders—

(*c*) Bachelors of law of any Indian University;

(*d*) Attorneys of the Superior Courts of England or Ireland.

5. (*a*) An Advocate of any High Court or Chief Court in British India of not less than 3 years standing who is eligible under Rule 3 may be admitted as an Advocate upon his undertaking in his application to have his name removed from the Roll of Advocates of that Court within 3 months from the

date of his admission to the Judicial Commissioner's Court. In the event of such undertaking not being carried out the Judicial Commissioner may direct that the Advocate's name be removed from the Roll.

(*b*) By special permission of the Judicial Commissioner granted for a particular occasion an Advocate of not less than 3 years standing on the roll of any other High Court in India, may if there be with him in a suit, appeal or other proceeding in the Court an Advocate on the roll of the Judicial Commissioner's Court, appear and plead in the Judicial Commissioner's Court in such suit, appeal or other proceeding on such occasion.

6. (*i*) Only Advocates are entitled to appear, plead or act in the Judicial Commissioner's Court.

(*ii*) An Advocate shall be entitled to an Advocate's Sanad in the form of appendix I.

(*iii*) A Pleader shall be entitled to an annual Sanad in form "A" of appendix II.

7. The fee payable on enrolment shall be as follows :—

(*a*) For an Advocate's Sanad Rs. 500/-.

(*b*) For a Pleader's Sanad Rs. 25/- per annum, provided that

(*i*) A Pleader who is enrolled as an Advocate under Rule 4 (1) (*a*) shall only be required to pay such fee as may be necessary to make the total fee paid up to Rs. 500/-.

(*ii*) No fee shall be required from an Advocate enrolled under Rule 5

8 All Barristers, Advocates and Pleaders practising in the Criminal or Civil Courts in Ajmer City shall on and after January 1931 be members of the Ajmer Bar Association and they may be debarred thereafter from practice by the Judicial Commissioner for default.

9. The rolls of Advocates and Pleaders respectively, in the order of their precedence at the Bar, shall be maintained in the Court of the Judicial Commissioner.

10. Advocates shall have precedence in all Courts in Ajmer-Merwara in which they are entitled under these Rules to plead, and in all applications and in the conduct of cases shall be entitled to appear, plead and act according to their precedence at the Bar.

11. Pleaders of the Judicial Commissioner's Court shall, subject to Rule 10, have precedence in all Courts in Ajmer-Merwara in which they are entitled under these rules to plead and shall be entitled as between themselves. to appear, plead and act in the conduct of cases and in all applications according to their seniority on the Roll; but the Government Pleader and Public Prosecutor shall have precedence over all Advocates and Pleaders.

12. No Attorney or recognized Agent, who is not also a Pleader, shall address the Court, but any person who is an Attorney or recognized Agent within the meaning of Order III, Rule 2 of Schedule I of the Code of Civil Procedure 1908 and Section 21 of the Ajmer Courts Regulation IX of 1926 may appear, apply or act for a party and do all other lawful acts in the conduct of a case.

13. The Judicial Commissioner may suspend or dismiss any Advocate or Pleader who is convicted of any Criminal offence implying a defect of character which unfits him to be an Advocate or a Pleader.

14. The Judicial Commissioner may, also after such enquiry as he thinks fit, suspend or dismiss any Advocate or Pleader holding a Sanad:—

(a) Who is proved to be guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or

(b) who tenders, gives or consents to the retention out of any fee paid or payable to him for his services of any gratification for procuring or having procured the employment, in any legal business, of himself or any other Advocate or Pleader,

(c) who directly or indirectly procures or attempts to procure the employment of himself as such Advocate or Pleader through or by the intervention of any person to whom any remuneration for obtaining such employment has been given by him, or agreed or promised to be so given, or

(d) who accepts any employment in any legal business through a person who has been proclaimed as tout, as hereinafter mentioned, or,

(e) for any other reasonable cause.

15. If it appears to the Judicial Commissioner prima facie that any Advocate or Pleader in his Court or in any Court subordinate thereto, has been guilty of fraudulent or grossly improper conduct under Rule 14, the Judicial Commissioner shall send him a copy of the charge and also a notice that on a day therein named such charge will be taken into consideration by the Court appointed to inquire into it.

16. Such copy and notice shall be served upon the Advocate or Pleader, at least ten days before the day so appointed and on such day so appointed and on such day or on any subsequent day to which the enquiry may be adjourned the Court shall receive all evidence properly tendered by or on behalf of the party bringing the charge, and by or on behalf of the Advocate or Pleader, and shall proceed to adjudicate on the charge.

17. The Judicial Commissioner may refer for enquiry to the District or Additional District Judge, any charge of misconduct under Rule 14, and may pass orders on perusal of the proceedings and report of that Court.

18. In any such case the Advocate or Pleader concerned shall be given opportunity of being heard by the Judicial Commissioner, before final orders are passed.

19. The Judicial Commissioner may, pending investigation, suspend the Advocate or Pleader concerned from practising in his Court or the Courts subordinate thereto.

20. No Advocate or Pleader shall be dismissed or suspended as the case may be under Rules 13, 14, or 19 unless and until the order of the Judicial Commissioner dismissing or suspending him has been confirmed by the Chief Commissioner.

21. When any Advocate or Pleader is suspended or dismissed under the above rules, he shall forthwith deliver up his Sanad to the Office of the Judicial Commissioner.

22. A note of the suspension of any Advocate or Pleader shall be made in the rolls maintained and notice thereof shall be sent to all Subordinate Courts. The name of the Advocate or Pleader dismissed shall be struck off the rolls and notice thereof shall be sent to all Courts, subordinate to the Court.

23. The District and Sessions Judge, and the District Magistrate may frame and publish lists of persons proved to their satisfaction by evidence of general repute, or otherwise, habitually to act as touts, and may, from time to time, alter and amend such lists.

(a) No persons' name shall be included in any such list until he shall have had an opportunity of showing cause against such inclusion.

(b) A copy of every such list shall be kept hung up in every Court to which the same relates.

(c) The Court of Judge may, by general or special order, exclude from the precincts of the Court any persons whose name is included in such list.

(d) Every person whose name is included in any such list shall be deemed to be proclaimed as a tout within the meaning of Rule 14.

APPENDIX I.

Certified that is admitted to practise as an Advocate in all the Courts of Ajmer-Merwara including the Court of the Judicial Commissioner and subject to the Rules from time to time in force in Ajmer-Merwara.

Given under my hand and the seal of the Court this day of one thousand nine hundred and .

APPENDIX II.

Certified that is admitted to practise as a Pleader in all the Courts of Ajmer-Merwara excluding the Court of the Judicial Commissioner and subject to the Rules from time to time in force in Ajmer-Merwara up to the .

Given under my hand and the seal of the Court this day of one thousand nine hundred and .

END.

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LAW JOURNAL.

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CONTAINING

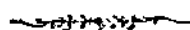
Cases determined by the Court of the Judicial Commissioner, Ajmer-Merwara, during 1934 and important Notifications applicable to Ajmer-Merwara.



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JYOTI SWARUP GUPTA,

Advocate.



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1934

Judicial Commissioners:

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(During the first and second Sessions.)

Mr. E. Weston, I. C. S.

(During the third Session.)

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Alphabetical Index of cases reported.

(**Indicates that the Judgment is not printed but only the* Law Point, *arising in it, is published.*)

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RAM KISHAN vs. RAM CHANDER. **66**

Review of Books.

Current Index, 1934, *Published by the Law Printing House, Mount Road, Madras, Price Rs. 4/-.*

This a new publication. It is a yearly digest of all Indian and important English cases reported in the different Law Reports and journals during 1934. The get up, print and type leave nothing to be desired. A useful table of cases over-ruled, distiguished or followed has been classified separately for convenience of reference.

Monthly parts and the cumulative half-yearly parts of this useful publication are also issued so that its readers may be posted with the latest case law.

Every purchaser of the Current Index for 1934 will be supplied free the monthly parts and the cumulative half-yearly parts only of the Current Index during 1935.

J. S. G.

COMMITTEE.

1. Mr. Suresh Chandra Mahresh.
2. Mr. Bridhi Chand Lakhotia.
3. Mr. Hira Lal Jain.

1. This part completes the volume for 1934 Ajmer-Merwara Law Journal. The indices for the *whole volume* are tacked on at the end of this Part.

2. The Section containing 'Notifications' has a separate paging. The pages containing 'Notifications', in the different parts, may be put together at the time of getting the volume bound.

3. The Editor is grateful to Messrs. Milap Chand Chabra, Chunni Lal Agarwal and Anandi Prasad Bhargava for supplying copies of certain notifications which have been included in this part.

4. The Editor is grateful to Mr. Javand Lal Dutt Chowdhry for having read the second proofs.

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